Supreme Court, U. S.
FILED
NOV 12 1973
MICHAEL RODAK, JR., CLERK

No. 73-759

In the Supreme Court of the United States

OCTOBER TERM, 1973

HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, *Et Al.*,

Appellants,

v.

MARSHA B. HEALY, *Et Al.*,

Appellees.

On Appeal From the United States District Court For the Eastern District of Louisiana

JURISDICTIONAL STATEMENT AND APPENDIX ON BEHALF OF APPELLANTS

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On Appeal From the United States District Court For the Eastern District of Louisiana

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Jurisdictional Statement

The opinion of the three-judge United States District Court for the Eastern District of Louisiana has not been reported. A copy of the opinion is attached hereto as Appendix A.

This suit was brought under the provisions of 28 U.S.C.A. §§2201, 2202, 2281, and 2284 to obtain declaratory and injunctive relief. The complaint sought to have Article 7, Section 41 of the Louisiana Constitution, Louisiana Revised Statutes 13:3055, and

Article 402 of Louisiana Code of Criminal Procedure, which provide an exemption of women from jury service, declared unconstitutional. The judgment of the Court below was entered on September 4, 1973. A copy of the judgment is attached hereto as Appendix B. The Court stayed the execution of its judgment on September 10, 1973. A copy of the stay is attached hereto as Appendix C. Appellants filed their notice of appeal on September 18, 1973, in the United States District Court for the Eastern District of Louisiana. A copy of the notice is attached hereto as Appendix D.

Jurisdiction

This Court has jurisdiction for this appeal pursuant to 28 U.S.C.A. §1253, which provides:

> Except as otherwise provided by law; any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Cases

The cases believed to sustain the Court's jurisdiction are:

(a) *Radio Corporation of America v. United States*, D.C. Ill., 95 F. Supp. 660, *aff'd*, 341 U.S. 412 (1950);

(b) *Anderson v. Martin*, 375 U.S. 399 (1964);

(c) *Palmetto Fire Insurance Company v. Connecticut*, 272 U.S. 295 (1926).

Constitutional and Statutorial Provisions

The three-judge court in the United States District Court, Eastern District of Louisiana, declared unconstitutional and enjoined the enforcement of Article 7, Section 41 of the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which are as follows:

(a) Article 7, Section 41 of the Constitution of Louisiana:

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

(b) LSA-R.S. 13:3055:

> A woman shall not be selected for jury ser-

vice unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

(c) Article 402 of the Louisiana Code of Criminal Procedure:

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Questions Presented

1. Do the Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve deny all of the male and female citizens of Louisiana due process and equal protection as sanctioned in the 14th Amendment of the United States Constitution?

2. Do the female and male plaintiffs fairly and adequately represent the class they purport to represent?

3. What is the class the female and male plaintiffs purport to represent?

4. What is the class the female intervenors purport to represent?

5. Did the female and male plaintiffs have standing to sue?

6. Did the female intervenors have standing to sue?

7. Did the three-judge court abuse its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)?

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of Louisiana. Appellees claimed to be litigating on their own behalfs and on behalf of others similiarly situated. Named as defendants were all of the appellants.

The complaint sought declaratory and injunctive relief before a three-judge court.

The three-judge court rendered its opinion on August 31, 1973, declaring Article 7, Section 41 of the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which provide an exemption of women from jury service, to be unconstitutional. Simultaneously the three-judge court overruled *Hoyt v. Florida*, 368 U.S. 57 (1961).

No testimony was adduced in the court below. The only reference to the alleged facts of the case is contained in the complaint.

Following the opinion and order of the court below, appellants filed a motion to stay execution. The stay was granted by order of the court dated September 10, 1973. Thereafter, appellants filed their notice of appeal.

Appellants consist of the original defendants. Appellees consist of all those originally designated as parties plaintiffs and intervenors.

The Questions are Substantial

This case is of great importance to the orderly administration of the jury service system in the State of Louisiana. The guiding hand of this Court is urgently needed to resolve a clear and direct conflict between state and federal courts operating in the same territory and having equal responsibility in passing on federal constitutional questions. Guidance is further needed to resolve a direct conflict between a lower federal court and this Court.

An anomalous situation now exists in Louisiana. In *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld the constitutionality of a Florida statute almost identical to the Louisiana Constitution and statutes involved in the present case.

The Louisiana Supreme Court has followed the decision in *Hoyt*, *supra*, in numerous cases. *See State v. Enloe*, 276 So. 2d 283 (1973); *State v. J. C. Curry*, 262 La. 280, 263 So. 2d 36 (1972); *State v. Daniels*, 262 La. 475, 263 So. 2d 859 (1972); *State v. Reese*, 250 La. 151, 194 So. 2d 279, *cert. denied*, 389 U.S. 996 (1967); *State v. Comeaux*, 252 La. 481, 211 So. 2d 820 (1968); *State v. Pratt*, 255 La. 919, 233 So. 2d 891 (1970); *State v. Alexander*, 255 La. 941, 233 So. 2d 891 (1970); *State v. Sinclair*, 258 La. 84, 245 So. 2d 365 (1971); *State v. Millsap*, 258 La. 883, 248 So. 2d 324 (1971), and *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971).

There has been no contrary jurisprudence from this Court since the *Hoyt* decision, although the Court has had the opportunity to overrule that case at least once in the past year. *See Alexander v. Louisiana*, 405 U.S. 625 (1972).

Appellants respectfully assert that this case presents an appropriate opportunity for this Court to articulate guidelines and standards to be followed in the future in order to avoid a repetition of the type of conflict here presented. That is one of the principal reasons that plenary review by this Court is now urgently sought.

Conclusion

We urge that the questions presented by this appeal are critical to the administration of the jury selection system in Louisiana and elsewhere and, further, that they are so substantial as to require plenary consideration by this Court. We ask that jurisdiction be noted.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General of Louisiana.

s/ Warren E. Mouledoux
WARREN E. MOULEDOUX,
First Assistant Attorney General,
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CERTIFICATE

I HEREBY CERTIFY that copies of the foregoing Jurisdictional Statement and Appendix have been served upon Mr. George Strickler, Jr., 1110 Royal Street, New Orleans, Louisiana 70116, by depositing same in the United States Mail, postage prepaid, addressed as above, this 7th day of November, 1973.

I FURTHER CERTIFY that copies of the foregoing Jurisdictional Statement and Appendix have been served upon Ruth Bader Ginsburg, Columbia University, 435 W. 116th Street, New York, New York 10027, and Sylvia Roberts, P. O. Box 3081, Baton Rouge, Louisiana 70821, by depositing same in the United States Mail, postage prepaid, addressed as above, this 7th day of November, 1973.

S/ Warren E. Mouledoux

WARREN E. MOULEDOUX,
First Assistant Attorney General
of Louisiana.

APPENDIX A

Opinion of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities,

Defendants.

CIVIL ACTION
NO. 73-688
SECTION "C"
(THREE-JUDGE COURT CASE)

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RUBIN, District Judge:

The Louisiana Constitution[1] and statutes[2] exempt women from service on juries unless they file a written declaration of their desire to serve. This benign dispensation has resulted in jury panels that, in the parishes here involved, have never included more than five percent females, and frequently less. The plaintiffs in this class action seek a declaration that the exemption provisions violate the rights of the class to Equal Protection and Due Process of the Law, and an injunction against continued enforcement of these laws.

I.

Three separate classes of suitors join in the attack: (a) one comprises all females in the named parishes; these women contend that both their right to serve on juries and their opportunity, should occasion arise, to litigate before juries is abridged; (b) another comprises all males in those parishes; these men contend that they are subject to more onerous jury service

[1]La. Const. Art. VII, §41.
[2]Under the authority of the state constitutional provision, separate statutes allow the exemption in civil and in criminal cases: LSA-R.S. 13:3055; La. Code of Criminal Procedure, Art. 402.

because similarly situated females are not required to serve; and (c) the third, the intervening class, is composed of female litigants in civil cases in state court; these contend they are deprived of a jury of their peers.

Because the jurisdiction of federal courts is limited by the Constitution to "Cases" and "Controversies," Art. III, Sec. 2, U.S. Constitution, they may not issue merely advisory opinions concerning the constitutionality of legislation, federal or state. Indeed the power to declare a statute unconstitutional is deduced from the necessity of determining its validity in order to decide a particular case or controversy.

A case, in the constitutional sense, must present a real controversy. A statute may be attacked as unconstitutional only by someone who has sustained or is in immediate danger of sustaining some direct injury from its enforcement. It does not suffice to show that one is injured merely as a member of the body politic. Frothingham v. Mellon, 1923, 262 U.S. 447, 43 S.Ct. 597.

This is what is meant by standing to sue, the requirement that, to justify attack on legislation, a litigant be able to show injury by the statute, "for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of value interests of concerned bystanders." United States v. SCRAP, 1973, ___ U.S. ___, ___ S.Ct. (slip op. at p. 16).

In *SCRAP*, only a few weeks ago, the Supreme Court focused the light of the decisions on standing:

the test is whether the litigant can show "injury in fact," that he has been or will in fact be "perceptibly harmed." The litigants in *SCRAP* met that test by alleging a "specific and perceptible harm that distinguished them from other citizens."[2]

It is not necessary that the harm be great or substantial; it suffices that it be small, indeed a trifle, so long as it distinguishes a person with a direct stake in the outcome of the litigation from a person with a mere interest in the problem. SCRAP, ___U.S. at___, ___ S.Ct. at ___, and note 14 (slip op. at p. 18).

We pretermit the question whether all females as a class suffer a specific and perceptible harm when required to write a letter in order to serve on juries or whether the greater burden of jury service imposed on males by the virtual exemption of females from jury duty is a palpable enough trifle. Together these two classes—all women and all men—comprise the entire adult citizenry, and they allege in effect a harm to the body politic. It may be questioned whether, if the entire citizenry is aggrieved by official action, they may seek judicial relief instead of following the political route accorded by the democratic process.

But there is a class of persons joined in prosecuting this suit who have both a direct and a personal interest: the intervenors representing women who have suits pending in state court.

Litigants have standing to allege the unconstitutionality of a statute or practice that potentially denies their right to Due Process of Law by interfering with

fair jury selection.[3] The intervenors' standing to sue gives justiciability to the entire case. "[A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323, 328-329. Accord: Atkins v. State Board of Education, 4 Cir. 1969, 418 F.2d 874, 876; Hackner v. Guaranty Trust Co., 2 Cir. 1941, 117 F.2d 95, 98.

The intervenors represent, through Ms. Baggett, females actually engaged in litigation in state courts. To deprive them of a jury comprising a fair cross section of the population, including females, is a claim of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 1969, 394 U.S. 103, 89 S. Ct. 956, 959. "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection." Carter v. Jury Commission, 1970, 396 U.S. 320, 90 S.Ct. 518, 523.

It is unnecessary to probe whether these litigants would have standing to challenge the provisions of the Louisiana Code of Criminal Procedure for jury selection in criminal cases, were that issue presented alone. Their right to challenge the Louisiana constitutional provision having been established, the issue of the en-

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[3] "[A] plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." National Student Association v. Hershey, D.C. Cir. 1969, 412 F.2d 1103, 1110.

tire scope of jury selection in all kinds of cases appears to be inescapably involved.

II.

Only twelve years ago, in Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, the Supreme Court upheld the constitutionality of a Florida statute almost identical to the challenged provisions of the Louisiana Constitution. That decision was followed in Leighton v. Goodman, S.D.N.Y. 1970, 311 F.Supp. 1181, and United States v. Caci, 2d Cir. 1968, 401 F.2d 664. *Hoyt* rested on the finding that Florida's statute was based on a reasonable classification and the venerable dictum in Strauder v. West Virginia, 1879, 100 U.S. 303, 310, unchallenged for eighty years, that a State may constitutionally confine jury duty "to males."

But the ground on which *Strauder* stood was eroded by Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, and crevassed by Frontiero v. Richardson, 1973, ____U.S.____, 93 S.Ct. 1764. In *Reed* the court held that an Idaho statute violated the Equal Protection Clause in providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. By according different treatment to applicants on the basis of their sex, the statute "establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed, supra*, 92 S. Ct. at 253.

"The Equal Protection Clause . . . [denies] to States the power to legislate that different treatment

be accorded to persons placed by a statute into different classes on the *basis of criteria wholly unrelated to the objective of that statute.*" (Emphasis supplied.) Id. at 253-54. By ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are thus similarly situated." Id. at 254.

While only four justices were willing in *Frontiero* to conclude that classifications based upon sex "are inherently suspect," seven justices agreed that it was unconstitutional for Congress, solely for administrative convenience, to deny a female member of the uniformed services the right to claim her spouse as a dependent for the purposes of obtaining increased quarters allowances and medical and dental benefits without proving his actual dependency, while according this right to males with respect to female dependency. Three concurring justices found that *Reed* "abundantly supports our decision today." ____U.S. at ____, 93 S.Ct. at 1773.

The minimum requirement of Equal Protection, then is that dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated *with respect to the objectives of the legislation.* The objective of the state legislation here attacked is the method of selecting juries. The state does not contend that there is any difference between males and females with respect to their qualifications or competency as jurors. Nor could it do so, for women's full competency is demonstrated by their complete acceptability if they volunteer. Hence the state

constitutional provision patently fails to meet the requirements of Equal Protection for women as potential jurors. Female litigants having standing to sue can properly raise this issue which applies to women as a class.

Female litigants are also denied Equal Protection by being compelled to have their cases decided by juries composed entirely or predominantly of males. If this were proper sauce for geese, there might be gander gravy too: states might with equal logic grant jury exemptions only to all male wage earners who do not ask to serve, with the result that litigants, male and female, would be compelled in practice to submit to verdicts by predominantly female juries. Males might then properly question whether they were being afforded Equal Protection of the laws.[4]

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[4]Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261, a federal criminal case tried in California, where no women were included on the panel of grand and petit jurors, is not directly applicable. But the court found the "purposeful and systematic exclusion" of women invalid, and observed:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet [it] is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.
>
> To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." 329 U.S. at 193, 67 S.Ct. at 264.

The Nineteenth Amendment brought women the right to vote, and freed them from strictures that had 43 years earlier been lifted from those males who had formerly been denied the franchise because of race. In the half century since then, women have moved in increasing numbers from hearthside into the world of work and business and politics. Forty percent of the American work force is female.[5] Over 57% of all American women between the ages of 20 and 24, and 45% of those between 25 and 34, are in the wage earning work force.[6]

Louisiana's continued subscription to the notion that women must be shielded from jury duty, unless they choose to volunteer, results in juries that are predominantly male. Whether favorable or unfavorable to females, the sexual prejudice implicit in the thesis that women are entitled to an exemption not accorded men imparts to the jury a potential prejudice, be it ever so subtle or intangible, that is real and meaningful. Compare Justice Murphy's dissenting opinion in Fay v. N.Y., 1947, 332 U.S. 261, 300, 67 S.Ct. 1613, 1633.

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[5]See Lexcen, The Equal Rights Amendment, 31 Federal Bar Journal 247, 250-51; U.S. Dept. of Labor, Women's Bureau, *Underutilization of Women Workers*, 1971 (revised), p. 1.

[6]U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1972. Table No. 341, at p. 217.

III.

Litigants, male or female, have a constitutional right to trial by an impartial jury drawn from a cross section of the community. The "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 220, 66 S.Ct. 984, 985. Since this is inherent in Due Process of Law, the denial may be challenged not only by a litigant who is a member of a class excluded from representation,[7] but even by one whose right to an impartially selected jury is biased by disproportionate partiality to a class that includes him. Peters v. Kiff, 1972, ___ U.S. ___, 92 S.Ct. 2163.

Peters held that a white defendant might challenge discrimination against black jurors. The opinion illuminates that the arbitrary exclusion of any well-defined class of citizens offends a number of related constitutional values:

— the members of the class excluded are denied Equal protection:

— potential jurors are denied the "privilege of participating equally . . . in the administration of justice;" and

[7] Whitus v. Georgia, 1967, 385 U.S. 545, 87 S.Ct. 643; Avery v. Georgia, 1953, 345 U.S. 559, 73 S.Ct. 891; Norris v. Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579; Carter v. Texas, 1900, 177 U.S. 442; Strauder v. West Virginia, 1879, 100 U.S. 303 (black defendants challenging discrimination against black jurors).

— "it stigmatizes the whole class, [of those excluded] even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority;' "

— "exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community." Id. at 2167.

The court concluded:

> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
>
> • • • • •
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has a relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. Id. at 2169.

Females, as individuals, bring to juries "qualities

of human nature and varieties of human experience," entirely different from those of males, and a diversity of temperament, among themselves, completely heterogeneous. Their absence from jury panels is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience, indispensable if the jury is to comprise a cross-section of the community.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," the Supreme Court declared in Smith v. Texas, 1941, 311 U.S. 128, 130, 61 S.Ct. 164, 165, referring to the exclusion of jurors based on race. In like tenor, referring to the exclusion of wage earners, in Thiel v. Southern Pacific Company, 1946, 328 U.S. 217, 223, 66 S.Ct. 987, the Court commented that the excluded class "constitute[s] a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system."

A jury panel that is almost entirely male, whether because females are excluded or because they serve only if they volunteer and almost none step forward, cannot be "truly representative of the community," and women's absence does "violence to the democratic nature of the jury system." The jury must not merely mirror the American male, just as it must not reflect the views of only one race or one stratum of society.

Due Process insists upon the integrity of the jury system. There may be no constitutional requirement that a state proceed by grand jury indictment, Hurtado v. California, 1884, 110 U.S. 516, 4 S.Ct. 111. But when prosecution is initiated by indictment, the state may not impose a discriminatory pattern in selecting the jury. Hill v. Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159.

Similarly, it is unnecessary to search the limits of the Constitution for a right to jury trial in civil cases. "Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring that the selection of membership is free from racial bias," Carter v. Jury Commission of Green County, 1970, 396 U.S. 320, 330, 90 S.Ct. 518, 523-24, and, we add, every other type of unconstitutional discrimination.[8]

IV.

Nor must this court await the day when the Su-

[8]The Supreme Court has considered the requirements of the Constitution with respect to the manner of selecting juries in a number of cases. It would be mere pedantary to review them all. But the landmarks stand high and clear.

In Glasser v. United States, 1942, 315 U.S. 60, 85-86, 62 S.Ct. 457, 471-472, Justice Murphy wrote, with respect to the selection of federal juries:

> "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;' the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.
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> • • • • •

preme Court itself has occasion to reconsider and overrule *Hoyt*.

But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'" Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

In that case the federal jury commissioner had included only those women whose names were on a list supplied by the Illinois League of Women Voters, and prepared exclusively from its membership. The court found this to be unconstitutional. The officials charged with choosing federal jurors,

"must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." Ibid.

See Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261 (women systematically excluded from grand jury); Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 66 S.Ct. 984 (all persons who worked for daily wage intentionally excluded from jury lists); Labat v. Bennett, 5 Cir. 1966, 365 F.2d 698 (wage earners systematically excluded from jury); State v. Madison, 1965, 240 Md. 265, 213 A.2d 880 (non-theists excluded from jury); Simmons v. State, Fla. 1966, 182 So.2d 442 (common laborers systematically excluded.)

Compare Fay v. People of the State of New York, 1947, 332 U.S. 261, 67 S.Ct. 1613, where the court rejected a challenge to state jury selection methods that resulted in blue ribbon juries as not violative of equal protection or due process, distinguishing the cases involving exclusion based on race as based on violation of federal legislation, 8 U.S.C.A. §44, designed to enforce the Fourteenth Amendment.

"This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." Rowe v. Peyton, 4 Cir. 1967, 383 F.2d 709, 714, affirmed 391 U.S. 54.

This also was the view of the Second Circuit, in Perkins v. Endicott Johnson Corp., 2 Cir. 1942, 128 F.2d 208, where Judge Frank pointed out that, for lower courts to continue to hold stubbornly to barren precedent would stultify them and unnecessarily burden the Supreme Court. See also In re Korman, 7 Cir. 1971, 449 F.2d 32, reversed by the Supreme Court because the Seventh Circuit incorrectly concluded that earlier doctrine had been discarded, 92 S.Ct. 2055; Browder v. Gayle, M.D. Ala. 1956, 142 F.Supp. 707, affirmed 352 U.S. 903, and cases cited therein; contra Ward v. Luttrell, E.D. La. 1968, 292 F.Supp. 162; Fishkin v. United States Civil Service Commission, N.D. Calif., 1969, 309 F.Supp. 40, appeal dismissed, 1970, 396 U.S. 278, 90 S.Ct. 557; see Comment (1941) 50 Yale Law Journal 1448, 1450.

When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding.

V.

Because the Louisiana Constitution denies all litigants Due Process of Law and deprives female litigants of their right to Equal Protection by according an exemption from jury service to women on a basis different from that available to men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service, we declare it and the statutes enacted pursuant to it unconstitutional.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

New Orleans, Louisiana
August 31, 1973.

MINUTE ENTRY
SEPTEMBER 7, 1973
RUBIN, J.

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZ-

MORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities,

---

CIVIL ACTION
No. 73-688
SECTION "C"

* * *

In the opinion dated August 31, 1973, on page 5, paragraph 3, line 3, "seven" should be "eight".

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

APPENDIX B

Copy of Judgment of 3-Judge United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities,

---

CIVIL ACTION
No. 73-688
SECTION "C"

JUDGMENT

This matter came on for hearing on a previous day, and for the written reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards,

Governor of La., Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Court, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional.

Dated at New Orleans, Louisiana, this 31st day of August, 1973.

BENJAMIN W. REISCH, Clerk
/s/ NELSON B. JONES,
Chief Deputy Clerk

APPROVED AS TO FORM:

/s/ ALVIN B. RUBIN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL,

A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities

---

CIVIL ACTION
NO. 73-688
SECTION "C"

AMENDED JUDGMENT

The Judgment of August 31, 1973 is amended to read as follows:

"This matter came on for hearing on a previous day, and for the written reasons on file herein,

"IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards, Governor of Louisiana, Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Court, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional and defendants are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional."

Dated at New Orleans, Louisiana, this 7th day of September, 1973.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

APPENDIX C

Stay of Execution of Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

v.

HON. EDWIN EDWARDS, Governor of Louisiana, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities,

Defendants.

CIVIL ACTION
No. 73-688
SECTION "C"
(THREE-JUDGE COURT CASE)

MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Defendants, through the Honorable William J. Guste, Jr. move this court pursuant to Rule 62(C) of the Federal Rules of Civil Procedure to order a stay of the execution of judgment rendered in this action on August 31, 1973, pending said defendants' appeal from said judgment to the Supreme Court of the United

States; and, as grounds for said motion, the defendants say:

1. That the defendants will suffer irreparable injury in the loss of time of its officers, agents, and employees and expenses to be incurred by the defendants in compiling respective lists of all the eligible women in Louisiana for jury service as ordered by the Court's said judgment, in the event that said judgment is reversed upon the defendants' said appeal therefrom;

2. That the defendants will suffer irreparable injuries in complying with the injunction decreed by the Court's final judgment, in the event said judgment is reversed on the defendant's said appeal therefrom.

WHEREFORE, defendants pray that this Court order a stay of the execution of its judgment rendered in this action on August 31, 1973, pending defendant's appeal to the Supreme Court of the United States.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General

/s/ WARREN E. MOULEDOUX
First Assistant Atty. General

/s/ ROBERT L. DANNER, JR.
Special Counsel
2-3-4 Loyola Bldg.—7th Floor
234 Loyola Avenue
New Orleans, Louisiana 70112
527-8375

Filed: Sept. 10, 1973
U.S. District Court
Eastern District of Louisiana
Benjamin W. Reisch
Clerk

ORDER

The defendants having moved for a stay of execution of, or any proceedings to enforce, the judgment entered in the above entitled cause pending the defendants' appeal to the Supreme Court of the United States.

IT IS ORDERED that execution of, or any proceedings to enforce, said judgment be and the same is hereby stayed until the defendants' appeal to the Supreme Court is disposed of.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

APPENDIX D

Notice of Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

v.

HON. EDWIN EDWARDS, Governor of Louisiana, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities,

Defendants.

CIVIL ACTION
No. 73-688
SECTION "C"
(THREE-JUDGE COURT CASE)

NOTICE OF APPEAL

Defendants, Honorable Edwin Edwards, Governor of Louisiana, et al., through the Honorable William J. Guste, Jr., pursuant to 28 U.S.C.A. §1253, hereby give notice of their appeal to the Supreme Court

of the United States from the Court's judgment entered on September 4, 1973.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General

/s/ WARREN E. MOULEDOUX
First Assistant Attorney General

Filed: Sept. 18, 1973
U.S. District Court
Eastern District of Louisiana
Benjamin W. Reisch
Clerk

B-4380, 11-73

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Date		*Page No.*
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March 16, 1973	Plaintiff's request for three Judge Court	9
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April 25, 1973	Defendants' mtn to dismiss; hrg set 5-9-73 at 10 a.m.; memorandum in support of defendants' motion to dismiss	13
May 30, 1973	Motion of Shirley Ann Robinson & Jenny Lee Smith Baggett to intervene and to join parties deft; hrg set 6-13-73 at 9 a.m.	29
May 30, 1973	Pltf's cross mtn for summary judgment; hrg set 6-13-73 at 9 a.m.	32
June 11, 1973	Memo for defts with respect to definition of the classes and absence of notice requirement	74
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June 13, 1973	Hrg on mtn of defts to dismiss — to be decided by 3-Judge Court; mtn to intervene by Shirley Robinson & J. L. S. Baggert—granted	79

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June 25, 1973	Pre-trial order; (No trial date set, date of conf not indicated) (ABR ent 6-27-73)	80
June 25, 1973	Plaintiffs' stipulation of facts	82
June 28, 1973	ORDER allowing intervention of Baggert & Robinson, pltfs and intervenors allowed to file amended complaint and complaint of intervention; this is proper Class Action (ABR ent 6-29-73)	85
August 31, 1973	OPINION (ABR 8-31-73)	87
August 31, 1973	JUDGMENT: as per hrg; order judgment in favor of plaintiffs and against defendants, declaring La. Jury Selection System whereby women may not serve on juries w/o filing a written declaration of their desire to do so unconstitutional (ABR 8-31-73 ent 9-4-73)	99
Sepember 6, 1973	M.E. opinion of 8-31-73 is amended as follows: Defts are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional (ABR, JM Wisdom, Blake West 9-6-73 ent 9-6-73)	100

Date		*Page No.*
September 10, 1973	Defts' mtn to stay execution of judgment pending appeal ORDER granting that judgment be stayed until defts' appeal to the Supreme Court is disposed of (ABR 9-10-73 West & Wisdom 9-10-73)	101
September 7, 1973	M.E. in the opinion dtd 8-31-73 on page 5, para. 3, line 3, "seven should be 'eight' " (ABR, Wisdom and Blake 9-7-73)	104
September 7, 1973	Amended Judgment; in favor of pltfs and against defts declaring La. Jury Selection System whereby women may not serve on juries w/o filing a written declaration of their desire to do so unconstitutional and defts are enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional (ABR, JMW, RBW 9-7-73 ent 9-10-73)	105
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CHRONOLOGY OF PROCEEDINGS

THREE JUDGE COURT 4-2-73 (ABR) (RBV) (JMV)

CIVIL DOCKET

UNITED STATES DISTRICT COURT **C** Jury demand date: **73-688**

D. C. Form No. 106A Rev.

TITLE OF CASE	CLASS ACTION	ATTORNEYS
MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY VS HON. EDWIN EDWARDS, GOVERNOR OF LA., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defts are sued both in their official and individual capacities *Additional parties listed on attached sheet		For plaintiff: (1) William E. Rittenberg Debra Millenson American Civil Liberties Union of La. 606 Common St. N.O.,LA. 522-0617 - 525-4961 (2) Ruth Bader Ginsburg Columbia University Law School New York, New York 10027 (3) SYLVIA ROBERTS NOW LEGAL DEFENSE AND EDUCATION FUND P.O. Box 3081 Baton Rouge, La. George M. Strickler, Jr. (4) 1110 Royal St. N.O., LA. 524-2237 For defendant: Warren E. Mouledoux (5) First Asst. Atty. General State Capitol Baton Rouge, La. Dale C. Wilks (6) Robert L. Danner, Jr. 234 Loyola Ave. Room 815 N.O., LA. (7) Louis A. Gardes, Jr. 234 Loyola Ave. 7th Floor N.O.,LA.

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 5 mailed	Clerk			3-16-73	American Civil Liberties Union				15.00
				3-19-73	CD# 94				15.00
J.S. 6 mailed AUG 1973	Marshal			10-12-73	State of La.	$5	00		
				10-16-73	CD#38			$5	00
Basis of Action: Rule 23 Allegation Pet. for permanent and temporary injunctions allowing pltfs. to sit on jury duty	Docket fee								
	Witness fees								
Action arose at:	Depositions								

C 73-688

DATE	PROCEEDINGS	Date Order or Judgment Noted
3-16-73	Complaint; 9 summons issued.	1
3-16-73	Pltfs. request for three Judge Court.	2
3-22-73	M.R. on summons served Edwin Edwards on 3-20-73.	3
3-26-73	Mtn and ORDER (ABR) that defts is granted an extension of 30 days to file responsive pleadings. 3-27-73.	4
3-29-73	M.R. on summons served Victor Grantham on 3-22-73.	5
3/29/73	M.R.'s on summs. to: Delos Fussell, served thru wife; Hon. Thos. Tanner, served thru E. Jenkins 3/22/73; A.B. Crow, served thru Ms. Smith 3/23/73; Hon. Wallace Edwards, served thru J. Mattles 3/23/73; Hon. Hilary J. Crain, served thru Ms. I. Brumfield 3/22/73; Robt. Fitzmorris, served thru Bea Erwin 3/22/73; Billy Weaver, served thru his son, Billy Jr., 3/22/73.	6
4-2-73	ORDER (Judge John R. Brown) designating a three judge Court; (ABR) (RBV) (JMV).	7
4-19-73	M.E. of 4-19-73; (ABR) a conf. was held 4-16-73; mtn to determine class is to be brought for hearing on 5-23-73 10am.	8
4-25-73	Defts. mtn to dismiss; hearing 5-9-73 10am.	9
5-1-73	M.E. of 5-1-73; (ABR) all mtns will be heard 5-9-73 9am.	10
5-7-73	Pltfs. mtn and ORDER (ABR) that George Strickler, Jr. be associated in this action. 5-4-73. ent 5-7-73.	11
5-7-73	Mtn and ORDER (ABR) hte hearing on defts mtn to dismiss be continued to 5-23-73 9am.	12
5/23/73	Hrg. of mtn. to determine class action & defts. mtn. to dismiss; CONTINUED til 5/30/73. (ABR) Ent. 5/25/73.	13
5-30-73	HRG on motion of deft to dismiss & To determin class - cont to 6-13-73 at 9am.	14
5-30-73	Motion of Shirley Ann Robinson & Jonny Lee Smith Baggett to intervene and to join parties deft; HRG set for 6-13-73 at 9am.	15
5-30-73	Plft's cross motion for summary judgment; HRG set for 6-13-73 at 9.	16
6/4/73	M.E.; 3-jdgm hrg. set 6/11/73 RESET for 7/6/73, Judge Boyle's Courtroom. (ABR) 6/1/73. Ent. 6/5/73.	17
6-11-73	Memorandum for defts with respect to definition of the classes and absence of notice requirement.	18
6-12-73	Memorandum in support of defts motion to dismiss and in opposition to plft's cross-motionfor summary judgment.	19
6-13-73	HRG On Motion of defts to dismiss - to be decided by 3 judge court; Motion to intervene by Shirley Robinson & J. L. S. Baggett - Granted	20
6/25/73	Pretrial ORDER. (No trial date set, date of conf. not indicated). (ABR) Ent. 6/27/73.	21
6/25/73	Pltfs. stipulation of facts.	22
6/28/73	ORDER allowing intervention of Baggett & Robinson, pltfs. & intervenors allowed to file amended complt. & complt. of intervention. This is proper CLASS ACTION. (ABR) Ent. 6/29/73.	23

SHEET # 2 C. A. 73-688 C

D. C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Noted
7-2-73	Amended complaint & complaint in Intervention, Issued (5) summons.	24
7-6-73	HEARING: Submitted.	25
8-31-73	OPINION: (ABR 8-31-73)	26
8-31-73	JUDGMENT: as per hearing; ORDER judgment in favor of pltfs Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, J. A. Walz and John J. Healy, and against defts Hon. Edwin Edwards, Vog of La., Hon Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. H. J. Crain, of 22nd Judicial Dist Court Delos Fussell, A. B. Crow, Billy W. Weaver, R. Fitzmorris and Victor Grantham, declaring Louisiana Jury Selection System whereby women may not serve on juries w/o filing a written declaration of their desire to do so unconstitutional. (ABR 8-31-73 ent 9-4-73) CLOSED CASE	27
9-6-73	M.E. Opinion of 8-31-73 is amended as follows: Defts are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional. (ABR, JH Wisdom, Blake West 9-6-73 ent 9-6-73)	28
9-10-73	Defts' mtn to stay execution of judgment pending appeal. ORDER granting that judgment be stayed until defts' appeal to the Supreme Court is disposed of. (ABR 9-10-73; West & Wisdom 9-10-73)	29
9-7-73	M.E. In the opinion dtd 8-31-73 on page 5 para 3, line 3, "seven should be "eight" (ABR, Wisdom and Blake 9-7-73)	30
9-7-73	Amended Judgment: in favor of pltfs and against defts declaring La. Jury Selection System whereby women may not serve on juries w/o filing a written declaration of their desire to do so unconstitutional and defts are enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional. (ABR, JHW, RBW 9-7-73 ent 9-10-73)	31
9-17-73	Ltr from Atty. Ginsburg stating new address.	32
9-18-73	Notice of appeal.	33
10-30-73	Transcript of proceedings on July 6, 1973 before Honorable John Minor Wisdom, Honorable Alvin B. Rubin and Honorable R. Blake West.	34
10-30-73	Orig record and transcript forwarded to Court of Appeals.	X
11-1-73	Record in its entirety returned from Court of Appeals; to be forwarded to Supreme Court.	X

SHEET #2 C.A. 73-688

HEALY v. EDWARDS, et al

D. C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Noted
	ADDITIONAL PARTIES	
	INTERVENORS: Shirley Ann Robinson Jenny Lee Smith Baggett	
	DEFENDANTS: John Wood Marvin Williams Harold Foil Preston Varnado Dewaine Seal	

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HILL, LINDA KALZ, CHARLES W. HILL, JERRY A. KALZ AND JOHN J. HEALY

versus

HON. EDWIN EDWARDS, GOVERNOR of LOUISIANA, HON. THOMAS M. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, JUDGES of the 22nd JUDICIAL DISTRICT COURT, DELOS RUSSELL, A.B. CROW, BILLY M. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; ALL DEFENDANTS ARE SUED BOTH IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES.

CIVIL ACTION

73-633

SECTION

SECTION C

COMPLAINT

I. Preliminary Statement

Plaintiffs, individually and on behalf of all persons similarly situated, seek to have this court declare unconstitutional and enjoin the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution, provisions that exclude from jury service all women who do not file with the Clerk of the Court a written declaration of their desire to serve as jurors. These provisions are challenged on the ground that they deny to women and men the equal protection of the laws safeguarded to all persons, male and female alike, by the fourteenth amendment to the United States Constitution.

Consonant with the dual aspect of jury service in our constitutional system -- it is at the same time a fundamental right and a fundamental responsibility of citizenship -- the named plaintiffs represent two classes: (1) the female class, persons whose right to serve on juries is conditioned on a registration requirement not imposed on similarly situated males, whose opportunity to litigate before juries on which members of their sex are represented is drastically curtailed, and whose

exclusion from responsibility to serve on juries sets them apart as subordinate citizens; (2) the Male Class, persons subject to a disproportionate obligation to serve on juries because similarly situated females are excluded from service.

II. Jurisdiction

1. This is a class action arising under the fourteenth amendment to the Constitution of the United States and 42 U.S.C. §1983. Jurisdiction is conferred on this court by 28 U.S.C §1343 (3),(4) which authorize adjudication and the injunctive relief sought herein. Declaratory relief is sought pursuant to 28 U.S.C. §§2201 and 2202. A three-judge court is required under 28 U.S.C. §§2281 and 2284.

III. Plaintiffs

A. Female Class

2. The named plaintiffs, Marsha Healy, residing at 420 Carroll, Mandeville, Louisiana 70448, Suzanne D. Hill, residing at RR5, Box 61, Covington, Louisiana 70433, Carolyn Hull, residing at Post Office Box 81, Madisonville, Louisiana and Linda Walz, residing at 420 Carroll Street, Mandeville, Louisiana are female citizens of the United States and of the State of Louisiana. Each of the named female plaintiffs is over the age of 21 years, literate in the English language, not under interdiction or otherwise incapable of serving as a juror because of a mental or physical infirmity, not under indictment and has never been convicted of a felony.

B. Male Class

3. The named plaintiffs, Charles W. Hill, residing at Route 5 Box 61, Covington, Louisiana, Jerry A. Walz, residing at 109 Bernay Drive, Slidell, Louisiana and John J. Healy, residing at 420 Carroll Street, Mandeville, Louisiana, are male citizens of the United States and of the State of Louisiana. Each of the named male plaintiffs is over the age of 21 years, literate in the English language, not under interdiction or otherwise incapable of serving as a juror because of a mental or physical infirmity, not under indictment and has never been convicted of a felony.

IV. Class Action

4. The plaintiffs named in paragraph (2) hereof bring this action on their own behalf and, pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated, such persons being female residents of St. Tammany Parish eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401, but excluded from such service unless they declare their desire to serve pursuant to Louisiana Code of Criminal Procedure Art. 402. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative female plaintiffs are typical of the claims of the class; and the representative female plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

5. The plaintiffs named in paragraph (3) hereof bring this action on their own behalf and, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of all persons similarly situated, such persons being male residents of St. Tammany Parish eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401, and subject to a disproportionate obligation to serve by reason of the exclusion of women from service pursuant to Louisiana Code of Criminal Procedure Art. 402. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative male plaintiffs are typical of the claims of the class; and the representative male plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. Defendants

6. Defendant Edwin Edwards is the Governor of the State of Louisiana and, as chief executive of the State, is charged with responsibility for execution and administration of the laws of the State of Louisiana.

7. Defendants, the Honorable Thomas W. Tanner, residing in Slidell, Louisiana 70458, the Honorable Wallace A. Edwards, residing in Covington, Louisiana 70433, and the Honorable Hilary J. Crain, residing in Franklinton, Louisiana 70438, are Judges of the 22nd Judicial District Court of the State of Louisiana, and are charged with the responsibility of appointing four of the jury commissioners of that district pursuant to Louisiana Code of Criminal Procedure Art. 404.

8. Defendants Delos Fussell, residing at Bush-Folsom Road, Covington, Louisiana 70433, A.B. Crow, residing at 1330 Front Street, Slidell, Louisiana, Billy W. Weaver, residing at Chandler Drive, Abita Road, Covington, Louisiana, and Vincent Granthan, residing at Bush, Louisiana, are members of the Jury Commission of St. Tammany Parish. As members of the Jury Commission, defendants Fussell, Crow, Weaver and Granthan are charged with the responsibility of selecting the persons who shall constitute the general venire of St. Tammany Parish in accordance with Louisiana Code of Criminal Procedure Art. 410, and of selecting the grand jury venire and petit jury venires of St. Tammany Parish pursuant to Louisiana Code of Criminal Procedure Arts. 410 and 416.

9. Defendant Robert Fitzmorris, residing at St. Tammany Court House, Covington, Louisiana, is Clerk of Court of the 22nd Judicial District of the State of Louisiana. As Clerk of Court, defendant Fitzmorris is an ex officio member of the Jury Commission of St. Tammany Parish in accordance with Louisiana Code of Criminal Procedure Art. 404, and is charged under Louisiana Code of Criminal Procedure Art. 417 with preparing a process verbal of the selection of the general venire and of the drawing of the grand jury venire and petit jury venire.

10. All defendants named in paragraphs (6)-(9) hereof are sued in their official capacities and as representatives of all other administrators, officers and agents charged with executing and administering the provisions of the Louisiana Constitution and statutes that deny to women and men equal rights and responsibilities with respect to jury service.

VI. Statement of the Claim

11. The named female plaintiffs, women residing in St. Tammany Parish, are eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401. As a result of the exclusionary prescriptions of Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution, these plaintiffs have never served on a jury nor have they ever been subpoenaed to appear for jury service, nor are they afforded the opportunity to litigate before juries on which members of their class are fairly represented.

12. The named male plaintiffs, men residing in St. Tammany Parish, are eligible for jury service pursuant to Louisiana Code of Criminal Procedure Art. 401. Plaintiffs Healy and Walz have been subpoenaed to appear for jury service and have served on a jury on one or more occasions. As a result of the exclusionary prescriptions of Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution, these plaintiffs are subject to a disproportionate jury service obligation.

13. The 1970 Census of Population, Louisiana General Population Characteristics, published by the United States Department of Commerce, Bureau of the Census, shows the total population of St. Tammany Parish over the age of 21 as 34, 823; the male population of the Parish as 16,674 (approximately 48%) and the female population as 18,149 (approximately 52%).

14. Although the named female plaintiffs and the members of their class are fully qualified to serve on grand

and petit juries in St. Tammany Parish, they are excluded by State law from such service unless and until they file with the Clerk of the Court of the Parish a written declaration of their desire to serve as jurors.

15. The named male plaintiffs and the members of their class are eligible to serve on grand and petit juries in St. Tammany Parish and are required by State law to serve on such juries without regard to their desire to serve as jurors. These plaintiffs are neither required nor permitted to file with the Clerk of the Court of the Parish a written declaration of their desire to serve or not to serve as jurors.

16. The exclusion of women from jury service mandated by Louisiana law arbitrarily and systematically deprives the named female plaintiffs and the class they represent of full and equal enjoyment and exercise of their rights and responsibilities as citizens of the State of Louisiana and of the United States in violation of the sixth amendment, and the due process, equal protection, and privileges and immunities clauses of the fourteenth amendment to the Constitution of the United States.

17. The exclusion of women from jury service mandated by Louisiana law constitutes an arbitrary, irrational and over broad classification, discriminating against the named male plaintiffs and the class they represent in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

18. The acts of the defendants in enforcing Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution, and specifically the refusal of the defendant Jury Commissioners to include the female plaintiffs and the members of their class in the general venire and grand and petit jury venires of St. Tammany Parish in the same manner in which the male plaintiffs and the members of their class are included, constitute unlawful discrimination on the ground of sex in violation of rights secured

equally to both classes of plaintiffs by the fourteenth amendment to the Constitution of the United States,

19. All acts alleged in this complaint to have been done or omitted by defendants were done or omitted under color of law of the State of Louisiana and under color of defendants' respective offices as officers and agents of the State of Louisiana.

20. The named plaintiffs and all those similarly situated and affected, on whose behalf this action is brought, are suffering and will continue to suffer irreparable injury and deprivation of rights secured to them by the fourteenth amendment to the United States Constitution by reason of the acts herein complained of; they have no adequate remedy to redress the wrongs and unlawful acts herein complained of other than this action for a declaration of rights and an injunction.

VII. Prayer for Relief

21. WHEREFORE, Plaintiffs respectfully pray, on behalf of themselves and all other persons similarly situated, that this court:

(a) Convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 to determine this controversy;

(b) Certify that this action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

(c) Declare that Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution are unconstitutional facially and as applied to plaintiffs and the classes they represent, to the extent that these provisions mandate dissimilar treatment of similarly situated men and women;

(d) Issue a preliminary and final injunction restraining defendants from enforcing Louisiana Code of Criminal Procedure Art. 402, Louisiana R.S. 13:3055, and Section 41 of

Art. 7 of the Louisiana Constitution;

(e) Issue a preliminary and final injunction requiring defendant Jury Commissioners to accord to plaintiff and the classes they represent equal rights and responsibilities with respect to selection for the general venire, grand jury venires and petit jury venires, and the grand juries and petit juries drawn therefrom;

(f) Assess reasonable costs and attorneys fees;

(g) Grant such other and further relief as this court deems just and proper.

RESPECTFULLY SUBMITTED:

WILLIAM E. RITTENBERG
DEBRA MILLENSON
American Civil Liberties Union of La.
606 Common Street
New Orleans, Louisiana 70130
522-0617

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Attorneys for Plaintiffs

TELEPHONE 522-0617

WILLIAM E. RITTENBERG
ATTORNEY AT LAW
606 COMMON STREET
NEW ORLEANS, LA. 70130

March 16, 1973

Mar 16 9 11 AM '73
BENJAMIN W. REISCH
CLERK

Clerk of Court
United States District Court
Eastern District of Louisiana
400 Royal Street
New Orleans, Louisiana

73-688
SECTION C

Re: Healy, et al. v. Hon. Edwin Edwards, et. al.

Dear Sir:

The captioned suit, filed today, involves a challenge to the constitutionality of a state statute and must therefore be heard by a three-judge court as required by 28 U.S.C. 2281, 2282 and 2284. I would appreciate you immediately taking whatever steps are necessary to notify the Court so that it may request the appointment of such a panel.

Sincerely,

William E. Rittenberg

WER/dd

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

March 29, 1973

Mr. Benjamin W. Reisch, Clerk
Eastern District of Louisiana
400 Royal Street
New Orleans, Louisiana 70130

No. 73-688, Healy, et al v. Hon. Edwin Edwards, et al

My dear Mr. Reisch:

In response to the request of Judge Rubin, I have constituted the Court in accordance with the * enclosed designation order which I request you to file. * I also enclose the pleadings, in reference to this matter, which were sent to me by Judge Rubin.

Copies of this order are being sent to the Judges.

Sincerely yours,

* Enclosures
cc: Hon. John Minor Wisdom
Hon. Alvin B. Rubin
Hon. R. Blake West

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BENJAMIN W. REISCH
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, ET AL, Plaintiffs, vs. HON. EDWIN EDWARDS, ET AL, Defendants.	NO. 73-688 C (1) Requesting Judge: Honorable Alvin B. Rubin Eastern District of Louisiana (2) District Judge: Honorable R. Blake West Eastern District of Louisiana (3) Circuit Judge: Honorable John Minor Wisdom (4) Date of Order: March 29, 1973

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay

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awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appe-ls, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

JOHN R. BROWN
Chief Judge
Fifth Circuit

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED APR 25 1973
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA R. HEALY, ET AL.	*	CIVIL ACTION
VERSUS	*	NO. 73-688
HON. EDWIN EDWARDS, GOVERNOR STATE OF LOUISIANA, ETAL.	*	DIVISION "C"

* * * * * * * * * * * *

MOTION TO DISMISS

Pursuant to Rule 12 b (6) of the Federal Rules of Civil Procedure, defendants, through the undersigned counsel, move to dismiss the complaint for the following reason:

I.

Plaintiffs' complaint fails to set forth a claim upon which relief can be granted.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

Dale C. Wilks
DALE C. WILKS
SPECIAL COUNSEL

Louis A. Gerdes, Jr.
LOUIS A. GERDES, JR.
SPECIAL COUNSEL

234 Loyola Ave.
7th Floor
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 25th day of April 1973

Dale C Wilks

Charles Cecil Feld
Charles Cecil Feld

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Marsha B. Healy, et al.	*	CIVIL ACTION
versus	*	NO. 73-688
Hon. Edwin Edwards, Governor	*	SECTION "C"
State of Louisiana, et al.	*	

* * * * * * * * * * * * * * * *

NOTICE

TO: William Rittenberg, Esq.
606 Common Street
New Orleans, Louisiana 70112

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Division "C", United States District Court, 400 Royal Street, City of New Orleans, on the 9th day of May, 1973, at 10:00 A.M. or as soon thereafter as counsel can be heard.

Dale C. Wilks
DALE C. WILKS
Special Counsel
State of Louisiana

Louis A Gerdes Jr
LOUIS A GERDES, JR.
Special Counsel
State of Louisiana

234 Loyola Building
7th floor
New Orleans, Louisiana 70112
527-8375

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ AND JOHN J. HEALY	:	CIVIL ACTION
		NO. 73-688
VERSUS	:	SECTION "C"
HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, JUDGES OF THE 22nd JUDICIAL DISTRICT COURT, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; ALL DEFENDANTS ARE SUED BOTH IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES	:	

: : : : : :

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The thrust of plaintiffs' complaint alleges that Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statute 13:3055, and Section 41 of Article 7 of the Louisiana Constitution of 1921, which provisions exempt women from jury service unless they file with the Clerk of Court a written declaration indicating their desire to be subject to such service, arbitrarily and systematically deprives both female and male plaintiffs and the class they represent of rights secured under the Sixth Amendment and the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution.

Defendants urge, as grounds for their motion to dismiss that:

(1) Both female and male plaintiffs lack standing to allege a deprivation of rights secured by the Sixth Amendment to the United States Constitution;

(2) Male plaintiffs lack standing to allege a deprivation of rights secured by the due process, equal protection and privileges and immunities clause of the Fourteenth Amendment to the United States Constitution;

(3) The exemption from jury service which is granted to women under Article 402 of the Louisiana Code of Criminal Procedure, R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921, is based upon a reasonable classification and its exercise rests on a rational foundation and thus, is constitutional.

I. FEMALE AND MALE PLAINTIFFS LACK STANDING TO ALLEGE DEPRIVATION OF RIGHTS SECURED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Commonwealth of Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1922), the United States Supreme Court set forth the test for determining whether a party has the right, i.e. "standing", to question the constitutionality of a statute as follows:

> "It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.
>
> This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.
>
> ...We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Emphasis ours). Massachusetts v. Mellon, 262 U. S. at page 488.

This principle was given early application and has been recurringly enforced in the courts' refusal to entertain cases which disclosed a want of a truly adversary contest. See also, Poe v. Ullman, 367 U. S. 497, 81 S. Ct. 1752 (1961); United States v. Raines, 362 U. S. 17, 80 S. Ct. 519 (1960); and Sierra Club v. Morton, 92 S. Ct. 1361 and Kaufman v. Dreyfus Fund, Inc., 14 F.R. Serv. 2d 401 (CA 3d 1970) holding that to be a member of the purported class, a named plaintiff must be aggrieved or immediately threatened with specific injury by virtue of defendants' actions which are challenged, and injury to the representative is a sine qua non of representation.

On July 27, 1972, in the case of Galliot v. U. S. Department of H.E.W., No. 71-2805 Summary Calendar, C.A. 5th, slip

opinion (1972), pp 2-3, the Fifth Circuit stated:

> "Federal courts traditionally have declined to decide questions of potentially constitutional significance - or, for that matter, questions of any other sort - unless they arise from a 'case or controversy' within the meaning of Article III of the United States Constitution. A 'controversy' in this sense involves considerably more than mere abstract philosophical disagreement with the wisdom, propriety or desirability of specific governmental activities, necessitating a judicial opinion 'advising what the law would be upon a hypothetical state of facts.' Aetna Life Insurance Co. v. Haworth, 1937, 300 U. S. 227, 241, 57 S.Ct. 461,_____, 81 L. Ed. 617, 621; Nashville, Chattanooga & St. Louis Railway v. Wallace, 1933, 288 U. S. 249, 262, 52 S.Ct. 345,____, 77 L.Ed. 730, 735; Byers v. Byer, 5 Cir., 1958, 254 F. 2d. 205, 208. A a corollay proposition, a party seeking relief must establish his interest in the outcome of the litigation by demonstrating actual or immediately threatened interference with his legal rights, rather than some speculative future adversity that may never materialize. Poe v. Ullman, 1961, 367 U. S. 497, 504, 81 S.Ct. 1952,_____, 6 L.Ed.2d 989, 996; International Longshoremen's and Warehousemen's Union v. Boyd, 1954, 347 U. S. 222, 74 S.Ct. 447, 98 L.Ed. 650." Gaillot v. U. S. Dept. of HEW, No. 71-2805 Summary Calendar, C.A. 5th, slip opinion, pp. 2-3.

In Donohoe v. Duling, decided by the 4th Circuit on August 1, 1972, 41 Law Week 2067, the court following the Supreme Court's decision in Tatum v. Laird, 40 Law Week 4850, held that it was essential for the plaintiff to show direct injury to himself and not sufficient to base his right to sue on injury to another.

In Mottolla v. Nixon, 41 Law Week 2068, decided by the 9th Circuit on July 13, 1972, the Court, citing the Supreme Court decision in Sierra Club v. Morton, 92 S.Ct. 1361 (1972) held that plaintiffs who failed to allege injury in fact lacked standing and that the mere possibility of injury was not sufficient for standing.

In the instant case, the plaintiffs, both male and female, have failed to allege or show that they have sustained or are immediately in danger of sustaining some direct injury or deprivation of their right to trial by an impartial jury as guaranteed by the Sixth Amendment. None of the plaintiffs have been tried by a Louisiana jury, nor are any of them presently threatened with criminal prosecution which might result in their being tried by a Louisiana jury.

In absence of any allegation or showing of direct injury or threat of injury, defendants maintain that plaintiffs do not possess the requisite standing to challenge Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statute 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921 on the grounds that these provisions deprive them of rights secured by the Sixth Amendment to the United States Constitution. Thus, having failed to present a "justiciable controversy", this court lacks jurisdiction to hear and decide the issues pertaining to the alleged deprivation of plaintiffs' Sixth Amendment rights.

II. MALE PLAINTIFFS LACK STANDING TO ALLEGE DEPRIVATION OF RIGHTS SECURED BY THE DUE PROCESS, EQUAL PROTECTION AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Leighton v. Goodman, 311 F. Supp. 1181 (1970), U. S. District Court, S. D. New York, suit was brought by a prospective male juror to declare unconstitutional a New York statute which grants exemption from jury duty to women. In dismissing the suit on defendant's motion pursuant to Rule 12 (b) (1) and (6), the court addressed itself to the issue of "plaintiff's "standing" and stated:

> "At the outset we have serious question as to whether plaintiff's action reveals sufficient danger of injury or harm to him to give him standing to attack the constitutionality of § 599 (7). See Gruenwald v. Gardner, 390 F. 2d 591 (2nd Cir) cert. denied, 393 U. S. 982, 89 S. Ct.456, 21 L.Ed. 2d 445 (1968). There is no indication that even if women were not entitled to statutory exemption plaintiff would not be required to serve. The most that can be said (although it is not asserted by plaintiff) is that if women were obligated to serve without exemption, fewer male jurors might be needed and plaintiff might then be among those not called, which at best presents an extremely thin basis for giving him the right to attack § 599 (7)."

Further, in the recent decision of Alexander v. Louisiana, 405 U. S. 625 (1972), the United States Supreme Court specifically addressed itself to the equal protection argument brought by a male challenging Article 402 of the Louisiana Code of Criminal Procedure and held accordingly:

> "Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code of Criminal Procedure. This claim is novel in this court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory

> "policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. Carter v. Jury Commission, 396 U. S. 320 (1970). But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service. ..." (Emphasis ours)

As noted by Judge Dawkins in U. S. ex rel Doris V. Henderson, 330 F. Supp. 797, W.D. of La. (1971):

> "The intentional exclusion by a State of qualified persons from a grand or petit jury because of race or national origin has been held to be violative of equal protection of the laws. Patton v. Mississippi, 332 U. S. 463, 68 S. Ct. 184, 92 L.Ed. 76 (1947); Hernandez v. Texas, 347 U. S. 475, 74 S.Ct. 667, 98 L. Ed. 866 (1954). The Supreme Court has not applied the equal protection clause to prohibit exclusion or inclusion on a jury for any reason other than race or national origin. See Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L.Ed. 469 (1953); Fay v. New York, 332 U. S. 261, 67 S. Ct. 1613, 91 L.Ed. 2043 (1947); Hoyt v. Florida, 368 U. S. 57, 82 S. Ct. 159, 7 L.Ed. 2d 118 (1961). It is well settled that the Constitution does not require proportional representation. Fay v. New York, supra; Hoyt v. Florida, supra; Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945). (Emphasis ours).

In view of the above cited cases, defendants assert that the male plaintiffs have not alleged or shown a direct injury or threat of sustaining a direct injury and thus, have no "standing" to allege deprivation of rights secured by the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution.

III. THE EXEMPTION FROM JURY SERVICE WHICH IS GRANTED TO WOMEN UNDER ARTICLE 402 OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE, R.S. 13:3055 AND SECTION 41 OF ARTICLE 7 OF THE LOUISIANA CONSTITUTION OF 1921, IS BASED UPON A REASONABLE CLASSIFICATION AND ITS EXERCISE RESTS ON A RATIONAL FOUNDATION, AND THEREFORE, IS CONSTITUTIONAL.

One of the basic principles of constitutional law with regard to class legislation is that classifications and restrictions which serve to penalize or restrict the exercise of a constitutionally protected right are to be scrutinized closely and must be shown to promote a "compelling governmental interest" in order to withstand attack under the Fourteenth Amendment. See, Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed. 2d 600 (1968); Skinner v. Oklahoma, 316 U. S. 535, 62 S. Ct. 1110, 86 L.Ed. 1655 (1942); Bates v. Little Rock, 361 U. S. 516, 80 S.Ct. 412, 4 L.Ed. 2d 480 (1960); Sherbert v. Verner, 374 U. S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963); Cipriano v. City of Houma, 395 U. S. 701, 89 S. Ct. 1897, 23 L.Ed. 2d 647 (1969).

Therefore, discrimination by sex is not patently unlawful or unconstitutional. See, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (Statute providing minimum wage for women but not men); Rodice v. New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 (1924) (special statute limiting hours of night work of women in cities with a particular population); Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (proscribing use of women as licensed bartenders); Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961) (jury duty voluntary for women but compulsory for men); Miskunas v. Union Carbide Corp., (7th Cir. 1968) 399 F.2d 847, cert. denied 393 U.S. 1066, 89 S.Ct.

718, 21 L.Ed. 2d 709(c), (denial to wife, but not husband of right to recover for loss of consortium); Gruenwald v. Gardner, (2nd Cir. 1968) 390 F.2d 591, cert. denied 393 U.S. 982, 89 S.Ct. 456, 21 L.Ed. 2d 445 (women given more favorable treatment than men in Social Security benefits); U.S. v. St. Clair, (D.C. N.Y. 1968) 291 F. Supp. 122 (men subject, women not, under Selective Service Act); Clarke v. Redker, (D. C. Iowa 1966) 259 F. Supp. 117, (fixing wife's residence by husband's but not the reverse); Heaton v. Bristol, (Tex. Cir. App. 1958) 317 S.W. 2d 86, cert. denied 359 U.S. 230, 79 S.Ct. 802, 3 L.Ed. 2d 765 and Allred v.Heaton , (Tex. Cir. Appl 1960), 336 S.W. 2d 251, cert. denied 364 U.S. 517, 81 S.Ct. 293, 5 L.Ed. 2d 265 (both involving denial of right of women to attend all-male state-supported college).

The rational basis and compelling state interest for exempting women from jury duty was passed on and upheld by the United States Supreme Court in Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961). In that case the constitutionality of a Florida statute almost identical to the provisions of La. C. Cr. Proc. Article 402 and Article 7, Section 41 of the Louisiana Constitution of 1921 was at issue. The Court upheld the constitutionality of the Florida statute stating:

> ". . . We cannot say that it is constitutionally impermissible for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." Hoyt, supra, at 368 U.S. 62, 82 S.Ct. 162-163

> "In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for service: men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law. Fla. Stat., 1959, Sec. 40. 10, F.S.A.
>
> In neither respect can we conclude that Florida's statute is not based on some reasonable classification, and that, it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."
> Hoyt, supra, at 368 U.S. 61, 82 S.Ct. 162.

There has been no contrary jurispurdence from the United States Supreme Court since the Hoyt decision, although the Court has had the opportunity to overrule the case at least once in the past year. In Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed. 2d 536 (1972) the question of the constitutionality of La. C. Cr. Proc. Article 402 was expressly avoided by the United States Supreme Court, the majority preferring to base the decision (reversing a conviction) on other grounds. To the contrary, in Leighton v. Goodman, 311 F.Supp. 1181 (1970) and United States v. Coci, 401 F.2d 664, 671 (2nd Cir. 1968), cert. denied, 394 U.S. 917, 89 S.Ct. 1180, 22 L.Ed. 2d 450 (1969), the constitutionality of the New York statute permitting women to claim exemption has been sustained, both

courts citing Hoyt v. Florida, supra.

The Louisiana Supreme Court, since the decision in Hoyt, has held in numerous cases, that the exemption provided to women by La. C. Cr. Proc. Art. 402 does not violate the due process provisions of the United States Constitution. See, State v. Enloe, No. 52,424 decided March 26, 1973; State v. J. C. Curry, 262 La. 280, 263 So.2d 36 (1972); State v. Daniels, 262 La. 475, 263 So.2d 859 (1972); State v. Reese, 250 La. 151, 194 So.2d 729, cert. denied, 389 U.S. 996, 88 S.Ct. 485, 19 L.Ed. 2d 495; State v. Comeaux, 252 La. 481, 211 So.2d 620 (1968); State v. Pratt, 255 La. 919, 233 So.2d 883 (1970); State v. Alexander, 255 La. 941, 233 So.2d 891 (1970); State v. Sinclair, 258 La. 84, 245 So.2d 365 (1971); State v. Millsap, 258 La. 883, 248 So.2d 324 (1971); and State v. Amphy, 259 La. 161, 249 So.2d 560 (1971).

Surely, we all recognize that during the past century women's rights have steadily increased to a point where, in most respects, they enjoy the same legal status as male members of our essentially industrial society. Much of this drive towards women's emancipation has resulted from feminists' organized efforts. The time may very well be ripe for amendment of La. C. Cr. Proc. Article 402, R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921, to remove the exemption of which plaintiffs complain. But the constitutionality of that statute does not turn on whether the state legislature would be well advised to amend it, or even upon the existence of some discrimination. It turns upon whether the classification based upon sex constitutes such an individous discrimination that it is patently arbitrary and utterly

lacking in any rational justification. If any reasonable basis exists for the alleged statutory discrimination, it must be upheld. See, McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed. 563 (1955). The court does not "sit as a superlegislature . . .", Salsburg v. Maryland, 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 (1953).

Granted, that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24-hour day task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies. Although some women now question this arrangement, the state legislature has permitted the exemption in order not to risk disruption of this basic family unit. Its action, defendants assert, is far from arbitrary and unreasonable.

SUMMARY

In conclusion, the defendants urge, in view of the above cited cases and authorities, that this court sustain their Motion to Dismiss on the grounds that plaintiffs' complaint fails to set forth a claim upon which relief can be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	*	CIVIL ACTION
VERSUS	*	NO. 73-688
HON. EDWIN EDWARDS, GOVERNOR STATE OF LOUISIANA, ET AL.	*	SECTION "C"

* * * * * * * * * * * *

ORDER

IT IS HEREBY ORDERED that pursuant to Rule 12 b (6) of the Federal Rules of Civil Procedure, the above captioned complaint be dismissed with prejudice, taxing costs against the plaintiffs.

New Orleans, Louisiana, this _____day of _____, 1973.

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FEB 23 PM '73
CLERK

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, on behalf of themselves and others similarly situated, Plaintiffs,	)	
SHIRLEY ANN ROBINSON and JENNY LEE SMITH BAGGETT, on behalf of themselves and others similarly situated, Applicants for Intervention,	)	CIVIL ACTION NO. 73-688 SECTION "C"
versus	)	
EDWIN EDWARDS, Governor of Louisiana; THOMAS W. TANNER, WALLACE A. EDWARDS and HILLARY J. CRAIN, Judges of the Twenty Second Judicial District; DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM, Members of the Jury Commission of St. Tammany Parish; JOHN WOOD, MARVIN WILLIAMS, HAROLD FOIL and DEWAINE SEAL, Members of the Jury Commission of Washington Parish, Defendants.	)	

MOTION TO INTERVENE AND TO JOIN PARTIES DEFENDANT

Applicants for intervention Shirley Ann Robinson and Jenny Lee Smith Baggett move for leave to intervene as parties plaintiff in this action pursuant to the terms of Rule 24(b) of the Federal Rules of Civil Procedure. Grounds in support of this motion are stated in the accompanying memorandum.

Pursuant to Rule 24(c), a proposed Amended Complaint in Intervention, embodying the claims of the applicants for intervention, as well as the claims of the existing plaintiffs, is submitted herewith.

Pursuant to Rules 15(a), 20(a) and 21 of the Federal Rules, plaintiffs move to amend the complaint and to join additional parties defendant by substituting the accompanying Amended Complaint in Intervention for the original complaint. The grounds for this request are stated in the accompanying memorandum.

Respectfully submitted,

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22 East 40th Street
New York, New York 70116

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1110 Royal Street
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524-2237

SYLVIA ROBERTS
Post Office Box 3081
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By: George M. Strickler Jr.
Attorneys for Plaintiffs and
Applicants for Intervention

Dated: May 30, 1973

NOTICE OF MOTION

Please take notice that plaintiffs' and applicants for interventions' Motion to Intervene and to Join Parties Defendant will be brought on for hearing in Section "C" of the United States District Court for the Eastern District of Louisiana, 400 Royal Street, New Orleans, Louisiana, on June 13, 1973, at ~~10:00~~ 9:00 a. m. or as soon thereafter as counsel may be heard.

George M. Strickler Jr.
GEORGE M. STRICKLER, JR.
Attorney for Plaintiff and Applicants
for Intervention

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Intervene and to Join Parites Defendant, together with accompanying memorandum and proposed Amended Complaint and Complaint in Intervention, was mailed, postage prepaid, first class, this 30th day of May, 1973, to:

Dale C. Wilks, Esq.
Louisiana Attorney General
234 Loyola Avenue
New Orleans, Louisiana 70112

George M. Strickler Jr.
GEORGE M. STRICKLER, JR.
Attorney for Plaintiffs and
Applicants for Intervention

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MAY 30 2 19 PM '73
BENJAMIN MADISON
CLERK

MARSHA B. HEALY, ET AL.	:	CIVIL ACTION
v.	:	NO. 73-688
HON. EDWIN EDWARDS, ET AL.	:	SECTION "C"

CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs, through the undersigned counsel, move for summary judgment for the following reason:

This case presents no genuine issue as to any material fact; plaintiffs are entitled to judgment for the relief requested in the complaint as a matter of law.

George M. Strickler
Attorney for Plaintiffs
1110 Royal Street
New Orleans, Louisiana 70116

NOTICE OF MOTION

Please take notice that plaintiffs' Cross-Motion for Summary Judgment will be brought on for hearing in Section "C" of the United States District Court for the Eastern District of Louisiana, 400 Royal Street, New Orleans, Louisiana, on June 13, 1973, at ~~10:00~~ 9:00 a. m. or as soon thereafter as counsel may be heard.

GEORGE M. STRICKLER, JR.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Cross-Motion for Summary Judgment and Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross Motion for Summary Judgment was mailed, postage prepaid, first class, this 30th day of May, 1973, to:

Dale C. Wilks, Esq.
Louisiana Attorney General
234 Loyola Avenue
New Orleans, Louisiana 70112

GEORGE M. STRICKLER, JR.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.,	:	CIVIL ACTION
v.	:	NO. 73-688
HON. EDWIN EDWARDS, ET AL.	:	SECTION "C"

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. Preliminary Statement

Plaintiffs, individually and on behalf of all persons similarly situated, seek to have this court declare unconstitutional and enjoin the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution, provisions that exclude from jury service all women who do not file with the Clerk of the Court a written declaration of their desire to serve as jurors. These provisions are challenged on the ground that they deny to women and men the equal protection of the laws safeguarded to all persons, males and females alike, by the fourteenth amendment to the United States Constitution.

Consonant with the dual aspect of jury service in our constitutional system -- it is at the same time a fundamental right and a fundamental responsibility of citizenship -- the named plaintiffs represent two classes: (1) the Female Class, persons whose right to serve on juries is conditioned on a registration requirement not imposed on similarly situated males, whose opportunity to litigate before juries on which members of their sex are represented is drastically curtailed, and whose exclusion from responsibility to serve on juries sets them apart as subordinate citizens; (2) the Male Class, persons subject to a disproportionate obligation to serve on juries because similarly situated females are excluded from service.

II. Both Female and Male Plaintiffs Have Standing to Bring this Action.

In urging lack of standing as grounds for their motion to dismiss, defendants totally misconceive the gravamen of the complaint. Although other constitutional provisions are implicated, it is plaintiffs' principal position that the Louisiana jury selection provisions challenged here have exposed and continue to expose them to dissimilar treatment solely on the basis of their sex; accordingly, these provisions deny to them the equal protection of the laws safeguarded to all persons, males and females alike, by the fourteenth amendment to the United States Constitution.*/ Frontiero v.

*/ Defendants apparently concede female plaintiffs' standing to allege a deprivation of rights secured by the equal protection clause. The motion to dismiss challenges only the standing of the male plaintiffs on this ground.

Richardson, 41 U.S. Law Week 4609 (May 14, 1973); Reed v. Reed, 404 U.S. 71 (1971); cf. Stanley v. Illinois, 405 U.S. 645 (1972).

The function of the standing requirement in a civil action challenging the constitutionality of federal or state legislation has been succinctly stated by the Supreme Court: it is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962); see Flast v. Cohen, 392 U.S. 83, 99 (1968). The test determinative of standing is twofold: (1) plaintiff must allege that the challenged action has caused or will cause him "injury in fact, economic or otherwise," Data Processing Service v. Camp, 397 U.S. 150, 152 (1969); (2) the interest sought to be protected by the complainant must be "arguably within the zone of interests to be protected or regulated" by the statutory or constitutional guarantee in question. Data Processing Service v. Camp, supra, 397 U.S. at 153. See Whitney v. Wilson City Board of Education, 427 F.2d 179, 180 (4th Cir. 1970).

It is beyond debate that the sex discrimination claims asserted by plaintiffs in this action fall within the "zone of interests" protected by the fourteenth amendment's equal protection guarantee. Frontiero v. Richardson, supra; Reed v. Reed, supra ("dissimilar treatment for men and women who are similarly situated" violates equal protection).

Equally clear is plaintiffs satisfaction of the requirement that they have a sufficient personal interest in the issues raised to import the concrete adverseness required for an Article III "case or controversy"; the challenged legislation has or will cause them "injury in fact."

A. Women as potential jurors.

The Louisiana jury selection statutes presume two classes of adult citizens: Those responsible for full participation in community life; those whose participation in community life is subordinate to their place at home. All men, regardless of their individual situation, rank in the former class; all women, married or single, mothers or childless, rank in the latter class. The "injury in fact" accomplished by this rigid sex-role stereotyping is apparent: women are injured by the inferior citizenship status to which the jury selection provisions assign them.

Women's access to an attribute of adult citizenship is impeded by the peremptory exclusion of their names from jury lists, and the requirement that they specially register to have their names placed on those lists. A man's chances of service on a Louisiana jury are not affected by his ignorance or misinformation about his right and obligation as a citizen to serve. A woman will never be afforded that right unless she first learns of it and how to exercise it. Most significantly, since jury service, more than voting, is an obligation as well as a right of citizenship, the total

exclusion of women from this responsibility invidiously relegates them "to inferior legal status without regard to [their] actual capabilities." Frontiero v. Richardson, supra, 41 U.S. Law Week at 4612. */

A plaintiff satisfying the "injury in fact" requirement may assert considerations of general public interest in seeking equitable relief against unlawful action. See Flast v. Cohen, supra; Baker v. Carr, supra. The right and obligation of female citizens to participate in the administration of justice on the same basis as male citizens is appropriately regarded as an essential accoutrement of the constitutional right to an impartial jury drawn from all segments of the community. Carter v. Jury Commission, 396 U.S. 320, 330 (1969); cf. Griswold v. Connecticut, 381 U.S. 479 (1965). Thus the right flows not simply to persons as potential jurors, but also to litigants and to society as a whole, helping to insure that the judicial system functions to provide the fair trials that representative juries promote. Carter v. Jury Commission, supra; Peters v. Kiff, 407 U.S. 493 (1972); Alexander v. Louisiana, 405 U.S. 625, 6 -- (1971)

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*/ For explicit recognition that jury service is both a "duty" and a "right, benefit or privilege," see Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Carter v. Jury Commission, 396 U.S. 320, 330 (1969); Broadway v. Culpepper, 439 F.2d 1253, 1258 (5th Cir. 1971) (jury service characterized as a crucial citizenship responsibility).

(concurring opinion). As the community will benefit from the assertion and vindication of plaintiffs' claim, the argument for according them the opportunity to present their case on the merits is compelling, for they raise not only the full status as citizens they seek for themselves, but also a larger public interest.

B. Male plaintiffs.

The "injury in fact" and "zone of interest" requirements are plainly met with respect to the male plaintiffs. While they have no wish to abdicate their right to be included automatically on jury rolls, they currently suffer the detriment of bearing more than their fair share of the responsibility which accompanies that right. Their chances of being called for jury duty are roughly twice as great as they would be if women were subject to service on an equal basis. This excessive burden injures them to the extent of work-time lost as a result of a call occasioned at least in part by exclusion of female names. Other options for time expenditure are also lost to them. Cf. De Kosenko v. Brandt, 63 Misc. 2d 895, 898, 313 N.Y.S. 2d 827, 830 (Sup.Ct. 1970) (If women prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping" to jury service, as the court supposed, would not men prefer golf or poker or a day at the races?). */

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*/ Leighton v. Goodman, 311 F.Supp. 1181 (S.D.N.Y. 1970), is rather a slim reed for defendants' assault on male plaintiffs' standing. Although the court did express doubts as to plaintiff's standing in that action, it went on to decide the case on the merits, surely an inappropriate course if an Article III "case or controversy" did not exist.

Clear support for the standing of the male plaintiffs appears in the cases in which the draft was attacked on the bases of sex discrimination. Although the plaintiffs ultimately lost on the merits, their standing was unquestioned. United States v. St. Clair, 291 F.Supp. 122 (S.D.N.Y. 1968); United States v. Cook, 311 F.Supp. 618 (W.D. Pa. 1970); United States v. Dorris, 319 F.Supp. 1306 (W.D. Pa. 1970); United States v. Clinton, 310 F.Supp. 333 (E.D. La. 1970). The nature of the injury occasioned to the male litigants in the draft cases closely resembles the injury sustained here -- increased likelihood that they would be required to fulfill a societal responsibility because members of the other sex were exempt from imposition of that responsibility. In this case, as in the draft cases, the male plaintiffs have been subjected to double exposure and, like the draftees, they have felt the impact of that exposure. */

C. Women as litigants.

Without women as triers of fact, women litigants suffer a demonstrable "injury in fact." For "the two sexes are not fungible; a community made up exclusively of one

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*/ Defendants mis the mark in their reference to Alexander v. Louisiaa, 405 U.S. 625 (1972). Here, male plaintiffs complain of an excess burden of jury service imposed upon them; they do not complain, as Alexander did, as a litigant who was not tried by a representative jury. Moreover, the passage from Alexander quoted by defendants did nothing more than leave open the question whether a male defendant could complain of the absence of women on his jury. The Court made it plain that it was unnecessary to reach that isue since the exclusion of blacks was sufficient reason to set aside Alexander's conviction. Further, the Court supplied, after its decision in Alexander, clear indication of how it would resolve the question when squarely presented. See Peters v. Kiff, 407 U.S. 493 (1972) (white defendant has standing to challenge exclusion of blacks).

is different from a community composed of both." Ballard v. United States, 329 U.S. 187, 193 (1946). A female personal injury plaintiff, for example, is likely to suffer a significant disadvantage from the absence of women on her jury. Empirical studies indicate that male-dominated juries, such as those which sit in Louisiana courts as a result of the challenged jury selection provisions, award greater damages to male than to female plaintiffs in civil cases, and are likely to give male defendants lighter sentences than female defendants in criminal cases. Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 192-97 (1971). Thus, women litigants are exposed to a risk beyond that encountered by any litigant whose case is presented to an improperly constituted jury; */ the exclusion of women from the jury rolls threatens harm peculiar to them as female litigants.

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*/ When a jury is improperly constituted, a litigant need now show that he was in some specific sense harmed by the infirmity, either for standing, or to prevail on the merits. Peters v. Kiff, 407 U.S. 493 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); Ballard v. United States, 329 U.S. 197 (1945); Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971); Ford v. White, 430 F.2d 564 (5th Cir. 1970); United States v. Butera, 420 F.2d 564 (1st Cir. 1970).

In sum, the right asserted by the female plaintiffs here is to full attribution to them of a characteristic of adult citizenship. Both as potential jurors and as litigants they are denied this full attribution by a qualification placed on the eligibility of women as jurors. This denial occasions "injury in fact." The right they claim is one in which they plainly have "a sufficient personal interest to impart the concrete adverseness required for an Article III case or controversy." Correspondingly, male plaintiffs fully satisfy standing requirements. They are disadvantaged by excess responsibility for jury service, with its attendant economic and time loss.

III. Dissimilar Treatment of Men and Women Solely on the Basis of Their Sex, as Mandated by Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution, Denies to Plaintiffs the Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution.

A. Female plaintiffs.

Female plaintiffs, as potential jurors and as present and potential litigants, claim that the Louisiana jury selection statutes, because they exempt women from jury service, deny plaintiffs and the class they represent the equal protection of the laws which the fourteenth amendment guarantees.*/ Plaintiffs' equal protection claims as both litigants and jurors are here treated together. Precedent

*/ See generally Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 708-21 (1971) (review of federal and state decisions on right or duty of women to serve on juries).

affirms that the exclusion of "identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels," Apodaca v. Oregon, 406 U.S. 404, 413 (1972), is a violation of equal protection both for litigants tried by discriminatorily selected juries, and for members of the group discriminated against. See Peters v. Kiff, 407 U.S. 493 (1972); Carter v. Jury Commission, 396 U.S. 320 (1969).

Many of the jury discrimination cases appear to blend "equal protection" and "due process" analysis without sharp distinction between the two. See, e.g., Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966); Mitchell v. Johnson, 250 F.Supp. 117 (M.D. Ala. 1966). Cf. Ford v. White, 430 F.2d 951 (5th Cir. 1970); McMannaman v. United States, 327 F.2d 21 (10th Cir. 1964); Padgett v. Buxton-Smith Mercantile Co., 283 F.2d 597 (10th Cir. 1960); Jewell v. Stebbins, 288 F.Supp. 600 (E.D. Ark. 1968). At base, the jury selection decisions appear to rest on a formulation tailored to the special concerns entailed in safeguarding lay participation in our system of justice in a manner reflective of the larger community served.

In effect, courts have applied to the exclusion from jury service of any "cognizable group or class of qualified citizens" the almost per se rule until recently reserved for discrimination against blacks. Grimes v. U.S., 391 F.2d 709 (5th Cir. 1968); see also McManaman, supra. The excluded

group, to be considered "cognizable," must represent simply a "distinct class" in the community. In the seminal decision Hernandez v. Texas, 347 U.S. 475, 478 (1954), the Supreme Court stated: "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time differences from the community norm may define other groups which need the same protection." Significantly, the Court pointed out in Hernandez that "the Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' -- that is, based on differences between 'white' and Negro." Moreover, more recent decisions have not required that excluded groups demonstrate discrimination against them in the community; groups labelled "cognizable" include daily laborers, Labat v. Bennett, supra, U.S. v. Hunt, 265 F.Supp. 178 (W.D. Tex. 1967); members of any "economic class," Smith v. Yeager, 465 F.2d 272 (3rd Cir. 1972); and nonalien Spanish-Americans, U.S. v. Pentado, 463 F.2d 355 (5th Cir. 1972).

The Supreme Court, in Hoyt v. Florida, 368 U.S. 57 (1961), deviated from this "cognizable group" approach insofar as it applied to women. While recognizing that women constituted a "class in the community," and that the exemption from jury service which Florida afforded them might have operated as an "exclusionary device," Hoyt, supra at 61, the Court

nonetheless refused to invalidate that exemption. Instead of applying the almost per se rule employed in other jury discrimination cases, the Court examined the Hoyt "exclusionary device" in terms of "minimal rationality" equal protection analysis. It considered whether exemption of all women was "based on some reasonable classification," Hoyt, supra at 61, decided that it was, and therefore held the statute constitutional. The Hoyt Court, perhaps because of the deference it had shown in other contexts to legislative classifications based on sex, see, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948), apparently viewed females as the only "distinct class" whose exclusion from jury service did not offend equal protection.

Recognizing that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both," Ballard v. United States, 329 U.S. 187, 193 (1946), a number of courts have characterized women as a "cognizable group" for purposes of jury discrimination equal protection analysis. See, e.g., Smith v. Yeager, supra; White v. Crook, 251 F.Supp. 401 (M.D. Ala. 1966). Ignoring or distinguishing Hoyt, these courts have held unconstitutional discrimination against women in jury selection just as they have invalidated jury selection discrimination against other groups. White v. Crook, supra; Ford v. White, 430 F.2d 951 (5th Cir. 1970). Most significantly, the Supreme Court itself has itself indicated its approval of this approach. See Peters v. Kiff, supra, 407 U.S. at 503-504 and n.12.

Hoyt no longer impedes or embarrasses federal courts confronted with jury selection statutes or practices that exclude or exempt women. For the Supreme Court has firmly rejected "minimal rationality" equal protection analysis for legislation that establishes sex-based classifications. Such classifications are now recognized to be "suspect" or "invidious." Frontiero v. Richardson, 41 U.S. Law Week 4609 (May 14, 1973).

1. The challenged Louisiana jury selection provisions work an invidious discrimination.

With some notable exceptions, until the current decade, the review standard for equal protection challenges to legislation according different treatment to women and men was deferential in the extreme. No line drawn between the sexes, however sharp, failed to survive constitutional assault. Gross generalizations concerning woman's place in man's world were routinely accepted as sufficient to justify discriminatory treatment. See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57 (1961).

In 1971, a new direction was signalled by the Supreme Court. In Reed v. Reed, 404 U.S. 71, the Court invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. Explictly repudiating one-eyed sex role thinking as a predicate for legislative distinctions, the Reed opinion declared

> [the statute] provides that different treatment be accorded to the applicants on the basis of their sex: it thus establishes a classification subject to scrutiny under the Equal Protection Clause. 404 U.S. at 75.

Recognizing that the governmental interest urged to support the Idaho statute was "not without some legitimacy," 404 U.S. at 76, the Court nonetheless found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are similarly situated." 404 U.S. at 77.

Reed was assessed by discerning courts */ and commentators **/ as a harbinger of fundamental change in the Supreme Court's perspective with regard to sex-based classifications. Although the Reed opinion was laconic, it was apparent that the Court had departed significantly from the "traditional" equal protection analysis familiar in review of social and economic legislation. Sex-based distinctions were to be subject to "scrutiny," a word until Reed typically reserved for race discrimination cases where the term was paired with a requirement that the legislation meet a "compelling

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*/ See Eslinger v. Thomas, F.2d (4th Cir. March 28, 1973); Brenden v. Independent School District, 41 U.S. Law Week 2590 (8th Cir. April 18, 1973); Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir., January 29, 1973); Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972); Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972); La Fleur v. Cleveland Board of Education, 465 F.2d 1185 (6th Cir. 1972); Williams v. San Francisco Unified School District, 340 F.Supp. 438 (N.D. Calif. 1972); Heath v. Westerville Board of Education, 345 F.Supp. 501 (S.D. Ohio 1972); Robinson v. Rand, 340 F.Supp. 37 (D. Colo. 1972); Bray v. Lee, 337 F.Supp. 934 (D.Mass. 1972); Shull v. Columbus Municipal Separate School District, 338 F.Supp. 1376 (N.D. Miss. 1972); Reed v. Nebraska School Activities Ass'n, 341 F.Supp. 258 (D.Neb. 1972); Matter of Patricia A., 31 N.Y.3d 83, 335 N.Y.S. 2d 33 (1972).

**/ Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 34 (1972); Note, 86 Harv. L.Rev. 568, 583-88 (1973).

interest" standard. "Traditional" equal protection rulings, by contrast, mandated judicial tolerance of a legislative classification unless it is "patently arbitrary": "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 306 U.S. 420, 426 (1961). See also Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Dandridge v. Williams, 397 U.S. 471, 485(1970).

On May 14, 1973, in Frontiero v. Richardson, 41 U.S. Law Week 4609, a judgment comparable in significance to Brown v. Board of Education, 347 U.S. 483 (1954), the Court made explicit the incurable flaw in governmental schemes that accord different treatment to males and females solely on the basis of their sex: "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.... And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." Frontiero v. Richardson, 41 U.S. Law Week at 4612.

The 8-1 judgment of the Court in Frontiero invalidated a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency, but authorized benefits for female members of the military only if they in fact supported their husbands. The differential at issue in Frontiero reflects a common statutory pattern. For dozens of examples on the federal level, see Petition for Certiorari, Appendix E, Commissioner of Internal Revenue v. Moritz, No. 72-1298 (March 22, 1973). Despite the obviously sweeping ramifications of rejection of this pervasive legislative pattern, the Court was unwilling to perpetuate approval of lump treatment of men and women. The message of Frontiero is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law. Legislative classifications may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to an individual's need, ability or life situation.

The plurality opinion in Frontiero, delivered by Justice Brennan, declares with unmistakable clarity that "classifications based upon sex, like classifications based on race, alienage or national origin, are inherently suspect and

must therefore be subjected to close judicial scrutiny."*/ While four Justices characterized sex classifications as "suspect," Justice Stewart, concurring in the judgment, preferred to label the distinction "invidious." All of the Justices, save the lone dissenter, rejected "administrative convenience" as justification for dissimilar treatment of men and women.

Frontiero concerned, as this case does, the assumption that women are destined for the care of husbands, home and children, men for participation in the world outside the home. Law-sanctioned assumptions of this kind, that fail to account for the substantial and dramatically increasing population of women and men who do not organize their lives according to the stereotype, have been relegated to the scrap heap by Frontiero.

It is plain that plaintiffs' claims in this case, exposed to the quality of judicial review required by Frontiero,**/ must prevail. As in Frontiero, the burden imposed

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*/ Contrast with the myopic statement in Hoyt, supra at 68, that "this case in no way resembles those involving race or color .... There is not present here the unfortunate atmosphere of ethnic or racial prejudice which underlay the situations presented in those earlier jury discrimination cases....", the awakening indicated in Frontiero, 41 U.S. Law Week at 4612: "the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries...."

**/ The Frontiero decision makes it abundantly clear that defendants misunderstand the "invidious" nature of sex discrimination and the scrutiny due to sex classifications. Even before Frontiero, the signposts were clear. See Reed v. Reed, supra; Stanley v. Illinois, supra.

on defendants to justify the sex-based differential is impossible to surmount. For convenient reference, and because of its overriding importance, a copy of Frontiero v. Richardson is annexed as an appendix to this brief.

2. Jury selection entails a fundamental right.

Strict review may be mandated in this case by the presence of another factor triggering closest scrutiny: a fundamental right. In Rodriguez v. San Antonio Independent School District, 41 U.S. Law Week 4407 (1973), the Supreme Court stated that the appellation "fundamental" is appropriate for "a right ... explicitly or implicitly guaranteed by the Constitution."

The right to an impartially constituted tribunal has been held to be specifically guaranteed to litigants by the due process clause of the fourteenth amendment: "a fair trial in a fair tribunal is an essential element of due process," Peters v. Kiff, supra at 501; "a just and fair trial by an unbiased, unprejudiced, and impartial tribunal is one of the great American constitutional principles. There can be no due process ... without it." Billingsley v. Clayton, 359 F.2d 13, 15 (5th Cir. 1966). See also Akins v. Texas, 325 U.S. 398 (1944); Mayfield v. Steed, 345 F.Supp. 806 (E.D. Ark. 1972); Heymann v. State of Louisiana, 269 F.Supp. 36 (E.D. La. 1967). Moreover, the right to an impartially chosen petit jury in a criminal trial is guaranteed not only by the due process clause in and of itself,

but also by the specific words of the sixth amendment, made applicable to the states via the due process clause in Duncan v. Louisiana, 391 U.S. 145 (1968).

As potential jurors as well, plaintiffs' right may be deemed "fundamental." The existence of a right to be eligible for jury service cannot be disputed -- numerous decisions, in both actions by members of allegedly excluded classes and actions by litigants alleging improper indictment or trial, have plainly recognized it. These decisions classify jury service as a "badge of citizenship" closely analogous to the vote. Carter v. Jury Commission, 396 U.S. 320, 330 (1969); Mitchell v. Johnson, 250 F.Supp. 117, 121 (M.D. Ala. 1966). See also Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Manns v. Allmann, 324 F.Supp. 114 (W.D. Va. 1971); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); White v. Crook, supra. While this right is not explicitly guaranteed by the words of the Constitution, an implicit guarantee may be identified, for the right to jury service is appropriately viewed as an essential sixth amendment accoutrement, cf. Griswold v. Connecticut, 381 U.S. 479 (1965), without which the right to trial by an impartial jury of one's peers could not be secured.

3. The "benign" classification that serves to keep women in their place.

It might be argued by persons who overlook the harmful effects of "special treatment" for women that the question whether a "suspect" or "invidious" classification, or

a "fundamental right" is involved in this case is irrelevant, at least insofar as it concerns female plaintiffs as potential jurors. For the nature of the classification, on surface inspection, may not appear invidious -- women are afforded the "special benefit" of not having to serve on juries. This superficial assessment may explain the Court's unwillingness in Hoyt to consider classification of women in a context similar to this as "suspect" -- apparently, in the Court's view, Florida women were being advantaged by that classification. But absence of responsibility for jury service is hardly an unmixed blessing. Jury duty, as noted above, cannot be characterized simply as a burden -- it is a vital right, a "crucial citizen responsibilit[y]," Broadway v. Culpepper, supra at 1258, and the Louisiana jury laws plainly impede plaintiffs' access to that right.

The automatic exemption from jury service which Louisiana extends to women is an indicia of second class citizenship, a reflection of the state's conception of women as a class not capable of shouldering the same civic rights and responsibilities as men: "statutes exempting women from jury service ... reflect the historical male prejudice against female participation in activities outside the family circle." Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 718 (1971). In short, while the provisions challenged here do not work an absolute denial to women of their right to serve on juries, they are

founded on a premise, similar to the premise once responsible for the exclusion of blacks from juries, that women are not equipped to participate in important community affairs: the Louisiana provisions betray "a view of woman's role which cannot withstand scrutiny under modern standards." Alexander v. Louisiana, 405 U.S. 625, 639-40 (1971) (concurring opinion).

A clear illustration of the invidious effect of the supposed "benign" classification is the response of a New York trial court in 1970 to the challenge of a female plaintiff to a jury system providing automatic exemption for any woman on request. Plaintiff's "lament," the judge stated, should be addressed to her sisters who prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems...." De Kosenko v. Brandt, 63 Misc. 2d 895, 898, 313 N.Y.S. 2d 827, 830 (Sup. Ct. 1970). Ignored by the court was the fact that "neither man nor woman can be expected to volunteer for jury service," Alexander, concurring opinion, supra at 643, that few persons, male or female, would voluntarily assume all the varied civic responsibilities imposed on them, and that in failing to recognize women as persons with full civic responsibilities as well as rights, New York, like Louisiana, displays a view of women as something less than mature adult citizens.*/

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*/ Other states have been more enlightened. By 1970, a majority of the states had totally eliminated exemptions for females only. Hearings on S.J.Res. 61 before Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong. 2d Sess. 725-27 (1970).

4. Contemporary definition of "exclusion" from jury service.

The standard phrase employed by courts to summarize what plaintiffs must establish in jury selection challenges is, as noted supra, "the exclusion of identifiable segments of the community." Apodaca v. Oregon, supra at 413. The definition of "identifiable segment" has already been discussed: women clearly constitute an "identifiable segment of the community." See Ballard v. United States, supra. "Exclusion" is established initially by the existence of a significant downward variation between the size of a "cognizable group" in the population of a community, and the proportion of that community's jury rolls which the group occupies. Hodnett v. Slayton, 343 F.Supp. 1142 (W.D. Va. 1972). If that disparity exists, then the plaintiff must demonstrate either "additional positive indicia of discrimination" or "that the selection procedure provides an opportunity to discriminate." Hodnett, supra at 1146; see also Alexander v. Louisiana, supra. In other words, plaintiffs must show that the disparity is not merely the product of chance. To put the matter concretely, when exclusionary devices were less subtle, black plaintiffs were usually able to prove complete denial of eligibility for jury service to members of their race. See, e.g., Norris v. Alabama, 294 U.S. 587 (1934). Over the years, however, courts have evolved a definition of "exclusion" which turns on the disproportion between the representation of a class of citizens in society and on jury rolls, and requires invalidation of systems providing for token inclusions of members of "cognizable groups." Scott v. Walker, 358 F.2d 561 (5th Cir. 1966).

The requirement of exclusion is plainly satisfied by plaintiffs here: "as a practical matter, automatic exemption equals automatic exclusion." Note, Women Jurors--Automatic Exemption, 36 Tul. L. Rev. 858, 861 (1962); "the automatic exemption, coupled with the failure even to apprise parish women of their right to volunteer, results in as total an exclusion as would obtain if women were not permitted to serve at all." Alexander, supra at 643 (concurring opinion). Clearly a large disparity exists between the proportion of women in the community and the proportion of women on the jury rolls. Moreover, there is no need to attempt to point to specific instances in which defendant jury commissioners have discriminated against females, for it is apparent from the face of the challenged provisions that the number of women on jury rolls is not a matter of chance. No mere "opportunity to discriminate" exists here; discrimination is positively mandated by the law which forbids jury commissioners to put female names on the jury venires. Obviously, the paucity of women jurors derives directly from the automatic exemption afforded them. Even a well-financed and continuing effort by defendants to inform women of their rights and encourage them to register for service would not overcome the legislative roadblock. For there can be little doubt that men or women, given the opportunity, would respond in the same way to an automatic exemption.

Perhaps because the concept of "exclusion" was still in the process of evolution at the time of the Hoyt decision, the Court focused on the Norris pattern, i.e., a deliberate, blanket shut-out, and concluded that "the relative paucity of women jurors does not carry the constitutional weight appellant would have it bear." Hoyt, supra at 65.*/ Under currently operative standards, however, all that need be demonstrated is that the jury selection mechanism may be at least partially responsible for the conspicuous disproportion. Alexander v. Louisiana, supra; Arnold v. North Carolina, 376 U.S. 773 (1963); Eubanks v. Louisiana, 356

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*/ Even more obsolete than the Hoyt decision is the Supreme Court's reasoning in Fay v. New York, 332 U.S. 261 (1947), which upheld New York's practice of not calling women to serve on its "blue ribbon" jury panels. In Fay, the Court assumed that cases involving Negro exclusions were "in a class by themselves," Fay, supra at 282, and that exclusion of other groups, specifically women, was justifiable under due process. As discussed above, the notion that "cognizable groups" are limited to blacks was rejected by the Court in Hernandez v. Texas, supra.

Fay is an anachronism for other reasons. It is premised upon the view of women's role vis-a-vis jury service taken by most of the states at the time it was decided: "in 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20." Fay, supra at 289. Today, Louisiana is the only state in the nation which does not put women on its jury rolls as a matter of course. Moreover, as the Fay court pointed out, at that time Congress implicitly approved state exclusion of women from juries by requiring federal courts to follow jury selection procedures in effect in the states in which they sat. The federal government now mandates that all federal juries be chosen from unexpurgated voter registration lists, 28 U.S.C. §1863, and that no discrimination based on race, color, creed, or sex be practiced in the selection of jurors 28 U.S.C. §1862. Further, Fay declared that the male defendant could not assert the exclusion of a class of which he was not a member -- a rule now explicitly overruled. Peters v. Kiff, supra; see also Mayfield v. Steed, supra. Fay also relied on the theory, since rejected, that for exclusion to be unconstitutional, it must not only be overt, but intentional. See Alexander v. Louisiana, supra; Salary v. Wilson, supra.

U.S. 584 (1957); Avery v. Georgia, 345 U.S. 559 (1953); Ford v. White, supra; Salary v. Wilson, supra; Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971); Hodnett v. Slayton, supra.

5. No "compelling state interest" justifies Louisiana's "special treatment" of women for jury service purposes.

As plaintiffs are members of a "cognizable group" which has been "excluded" from jury service, and moreover should be regarded as members of "suspect" or "invidious" classification whose access to a "fundamental right" has been impeded by the state, their claims should receive the strict constitutional review which both the reasoning in jury discrimination cases and equal protection analysis demand. The statutes here challenged cannot survive such review, for they are unsupported by any "compelling state interest." See Frontiero v. Richardson, supra at 4612; McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967).

When legislation is subjected to "strict scrutiny" review, "the burden of justification is cast upon the state rather than on the challenging party." Note, Developments in the Law -- Equal Protection, 82 Harv.L. Rev. 1965, 1101 (1969). Defendants cannot discharge this burden, for the apparent justification, administrative convenience, hardly ranks as an "overriding statutory purpose." Frontiero v. Richardson, supra, 41 U.S. Law Week at 4615; see also Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). Indeed, the "special treatment" of women works against the "overriding" purpose of the Louisiana jury selection laws, which logically must be to secure the service of ample numbers of qualified jurors. By exempting women from service, Louisiana deprives

its trial courts of an important source of jurors.

Moreover, if a purpose of the classification is to provide for the care of young children, to ensure that they are not left without caretakers when their parents are called for jury service, the gross technique employed cannot pass constitutional muster, for it is at the same time appallingly overbroad and stereotypically underinclusive. Childless women and women whose children are cared for by others are accorded the same "special treatment" as women in fact responsible for the care of young children; men responsible for the care of young children are not part of the statutory classification. Other, far more appropriate alternatives are available to advance the legitimate interest in assuring care for young children, for example, jury laws which provide exemption for any "person" responsible for a young child's care. See N.J.S.A. 8A: 69-1, 2(9); see also Revised Codes of Montana §93-1304 (12). Thus, under strict scrutiny the challenged jury laws and the classification they embody must necessarily be declared unconstitutional -- no compelling interest can be advanced to support them, and other methods are available to the state to accomplish any legitimate objectives the statutes might serve.

6. No fair and substantial relationship exists between the sex-based means employed in the challenged statutes and any legitimate state objective.

The resemblance between the legislation challenged in this case and the statutes involved in Frontiero and Reed is apparent. All three purport to serve the end of administra-

tive convenience; all of them rest on stereotypical assumptions about the roles of men and women. The classification plaintiffs challenge, as noted supra, has two conceivable objectives: administrative convenience, and ensuring care and supervision of children. Administrative convenience was precisely the rationale for sex-based classification held insufficient in Frontiero and Reed:

> [A]lthough efficacious administration of governmental programs is not without some importance, "the constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656 (1972).... [In] the realm of "strict judicial scrutiny"... any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience necessarily commands "dissimilar treatment for men and women who are ... similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]...." Reed v. Reed, supra, at 77, 76. Frontiero, supra at 4613.

As the Louisiana jury provisions mandate "dissimilar treatment" for reasons kin to those reflected in the statutes before the Court in Frontiero and Reed, the Louisiana provisions must be held to violate the command of equal protection.

Nor can it be claimed that plaintiffs here, unlike the complainants in Frontiero and Reed, are not "circumstanced similarly" to men for purposes of jury service. The argument that women, as housekeepers and mothers, do not hold jobs from which absence is manageable, ignores the reality that many women do not perform the housekeeper-mother role, that some who do perform that role have ample assistance at home, and that, particularly in young families, the home burden is increasingly shared by men and

women. In short, the Hoyt image of women "as the center of home and family life," of dubious accuracy for many women in 1961, is today recognized as a stereotype of the same order as those firmly rejected as a basis for legislative line-drawing in Frontiero and Reed. See also Stanley v. Illinois, 405 U.S. 645(1972).

In 1972, 60% of all married women living with their husbands were gainfully employed, and 42% of all working women were employed full-time the year round. U.S Women's Bureau, Dept. of Labor, Highlights of Women's Employment and Education (1973). Thus, the Louisiana jury service exemption for women covers a substantial population of wives and mothers for whom homemaking and child care concerns do not preclude active involvement in employment outside the home. Moreover, the assumption that women lead full-time home and child-centered lives has scant reality for childless women, married or single, and for women whose children have reached school age. See Johnston & Knapp, supra at 718. For these women, automatic exemption from jury service is wholly irrational they do not perform the duties apparently envisioned by the Louisiana legislature. Whether they are gainfully employed or function as homemakers, they cannot be placed in a class apart from men, many of whom may find jury service severely burdensome.

Women and men then, with the possible exception of persons responsible for the care of very young children, are "similarly circumstanced" for the purpose of jury service. Classification of all women for automatic exemption is stunningly overinclusive and, under Frontiero and Reed, inevitably unconstitutional. Like the statute in Frontiero and Reed, the legislative classification here challenged makes an "arbitrary choice" premised upon wholly mistaken conceptions of the role of women in today's world. See Alexander, supra at 639 (concurring opinion); if it advances any legitimate objective, it does so in a manner inconsistent with equal protection standards.

B. Male plaintiffs

Male plaintiffs claim that the exemption from jury service automatically extended only to women by Louisiana constitutes an arbitrary, irrational, and overbroad classification, discriminating against them and the class they represent in violation of the equal protection clause of the fourteenth amendment. Recognizing the important "right" aspect of jury duty, these plaintiffs point out that jury service also has its onerous side, that it is both "a right and a responsibility that should be shared by all citizens regardless of sex." White v. Crook, supra at 408. It is unconstitutional, they claim, to impose upon them, solely on the basis of their sex, so disproportionate a share of the jury service right-responsibility.

The "close scrutiny" of sex classifications employed by the Supreme Court in Frontiero and Reed, supra, is applicable here. The sex-based criterion at issue in Frontiero and Reed was held an "arbitrary legislative choice." Presumably that choice would have been no less "arbitrary" had it been made in favor of women. Cf. Stanley v. Illinois, supra. This view of Reed was accepted and applied by the Tenth Circuit in Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972). In Moritz, the denial, which the court foud was made on the basis of sex, of an income tax deduction for expenses incurred by male plaintiff in providing care for his invalid mother was declared a violation of equal protection. "When placed under the scrutiny required in viewing sex discrimination, Reed v. Reed, supra," the court said, "we find justification for the discrimination lacking.... It is not one having a fair and substantial relation to the object of the legislation dealing with the amelioration of burdens on the taxpayer." Moritz, supra at 470. Significantly, the Frontiero opinion cites Moritz with approval. 41 U.S. Law Week at 4613 n.25. */

Applying the Frontiero, Reed-Moritz rationale here, the classification of which male plaintiffs complain must fall. For the basic premise of these decisions is that legislative classifications must treat men and women "similarly circumstanced"

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*/ Note too that the sex-based classification in Frontiero was invalidated in response to the joint complaint of Sharron and Joseph Frontiero. Both claimed that the statutory scheme worked invidious discrimination against men as well as women via its assumption that women tend the home, men the world outside it.

alike. As noted above in the discussion of female plaintiffs' equal protection claim, the jury service exemption for women does not treat alike all "similarly circumstanced" persons -- women in precisely the same situation as men for purposes of the provisions are recipients of "special treatment." Similar to the classification in Moritz, this exemption places a burden upon men not justified by any fair and substantial relation to the statutory objective. Correspondingly, the exemption overbroadly relieves women from sharing the burden. Moreover, men and women similarly circumstanced with regard to an underlying purpose of the classification in that they are responsible for the care of small children are not treated alike. In sum, as discussed above in the context of female plaintiffs' equal protection claims, the classification does not advance a legitimate legislative objective in a fashion consistent with the constitutional mandate.

IV. Article 402 of the Louisiana Code of Criminal Procedure, Louisiana R.S. 13:3055, and Section 41 of Article 7 of the Louisiana Constitution Require Defendant Jury Commissioners to Pursue a Course that Collides with their Obligations under the Federal Constitution.

The challenged jury selection provisions compel the administrative officials charged with their enforcement to follow a course of conduct at odds with the strictures of the fourteenth amendment. As the Fifth Circuit stated in Brooks v. Beto, supra, the Constitution places upon these

officials "a specific, tangible, identifiable burden.... They must uncover the source of competent jury prospects from all significantly identifiable elements of the community." Brooks, supra at 12. See also Smith v. Yeager, supra; Salary v. Wilson, supra; Mobley v. United States, 379 F.2d 768 (5th Cir. 1967); U.S. ex rel Seals v. Wiman, supra, Bary v. United States, 248 F.2d 201 (10th Cir. 1957).

The Louisiana jury commissioners are disarmed by state law from satisfying their federal constitutional obligation. Women, as discussed above, are plainly an "identifiable" element in the community. But the commissioners may not initially list any female names. Moreover, good faith efforts by defendant jury commissioners to encourage women to volunteer would not suffice to overcome the statutory barrier. "[T]hose charged with administering the jury selection machinery may not transfer to the Negro community or to any other segment of the community the responsibility placed by law upon them...." Salary v. Wilson, supra at 472 (emphasis supplied).

In short, the exemption of Louisiana female citizens from jury service makes it impossible for Louisiana jury commissioners to comply with the constitutional obligations inherent in their position. Clearly the laws which put this unconstitutional strait jacket on the activities of those commissioners should be invalidated.

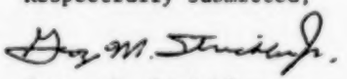
Finally, it should be noted that the Louisiana jury laws, by setting up tribunals upon which barely half the population is represented, contribute to the creation of conditions for the administration of justice that are less than optimal. The fact that the law itself places obstacles in the way of representative lay participation in trial courts serves to diminish respect for that law. Thus, the injury which the Louisiana jury service exemption for women inflicts is not limited to plaintiffs here or to the classes they represent; "there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S.187, 195 (1945).

CONCLUSION

For the reasons stated above, defendants motion to dismiss should be denied, and plaintiffs motion for summary judgment should be granted; Louisiana Code of Criminal Procedure Art. 402, Louisiana R. S. 13:3055, and Section 41 of Art. 7 of the Louisiana Constitution should be declared unconstitutional facially and as applied to plaintiffs and the classes they represent, to the extent that these provisions mandate dissimilar treatment of similarly situated men and women; an injunction should issue restraining defendants

from enforcing the aforesaid provisions and requiring them to accord plaintiffs and the classes they represent equal rights and responsibilities with respect to selection for the general venire, grand jury venires and petit jury venires, and the grand and petit juries drawn therefrom.

Respectfully submitted,



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APPENDIX

Frontiero v. Richardson,

___ U.S. ___ (May 14, 1973)

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, v. Elliot L. Richardson, Secretary of Defense, et al.

On Appeal from the United States District Court for the Middle District of Alabama.

[May 14, 1973]

Syllabus

A married woman Air Force officer (hereafter appellant) sought increased benefits for her husband as a "dependent" under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076. Those statutes provide, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support. When her application was denied for failure to satisfy the statutory dependency standard, appellant and her husband brought this suit in District Court, contending that the statutes deprived servicewomen of due process. From that Court's adverse ruling, they took a direct appeal. *Held:* The judgment is reversed. 341 F. Supp. 201, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, concluded that 37 U. S. C. §§ 401, 403 and 10 U. S. C. §§ 1072, 1076, as inherently suspect statutory classifications based on *sex*, are so unjustifiably discriminatory as to violate the Due Process Clause of the Fifth Amendment.

MR. JUSTICE STEWART concluded that the challenged statutes work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U. S. 71.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, while agreeing that the statutes deprive servicewomen of due process, concluded that in the light of *Reed* v. *Reed*, 404 U. S. 71, and the fact that the Equal Rights Amendment has been submitted to the States for ratification, it is inappropriate to decide at this time whether sex is a suspect classification.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed a statement concurring in the judgment. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined. REHNQUIST, J., filed a dissenting statement.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. 37 U. S. C. § 401; 10 U. S. C. § 1072 (2)(C).[2] Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. 341 F. Supp. 201 (1972). We noted probable jurisdiction. 409 U. S. — (1972). We reverse.

I

In an effort to attract career personnel through reenlistment, Congress established, in 37 U. S. C. § 401 *et seq.*, and 10 U. S. C. § 1071 *et seq.*, a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry.[3] Thus, under 37 U. S. C. § 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters" and, under 10 U. S. C. § 1076, a member's dependents are provided comprehensive medical and dental care.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

[2] 37 U. S. C. § 401 provides in pertinent part:

"In this chapter, 'dependent,' with respect to a member of a uniformed service, means—

"(1) his spouse;

. . . . . .

"However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. . . ."

10 U. S. C. § 1072 (2) provides in pertinent part:

"'Dependent,' with respect to a member . . . of a uniformed service, means—

"(A) the wife;

. . . . . .

"(C) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . ."

[3] See 102 Cong. Rec., 84th Cong., 2d Sess., 2949-3050 (Cong. Kilday), 8043 (Sen. Saltonstall); 95 Cong. Rec., 81st Cong., 1st Sess., 7062 (Cong. Kilday), 7061 (Cong. Short), 7866 (Cong. Havenner), 7067 (Cong. Bates), 7871 (Cong. Price). *See also* 10 U. S. C. § 1071,

half of his support.[1] Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[2] In essence, appellants asserted that the discriminatory impact of the statutes is two-fold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members,[3] a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family—and the wife typically the "dependent" partner—"it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." 341 F. Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." *Ibid.*

II

At the outset, appellants contend that classifications based upon sex, like classifications based upon race,[4] alienage,[5] and national origin,[6] are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in *Reed* v. *Reed*, 404 U. S. 71 (1971).

In *Reed*, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Appellant, the mother of the deceased, and appellee, the father, filed competing petitions for appointment as administrator of their son's estate. Since the parties, as parents of the deceased, were members of the same entitlement class, the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment.

The Court noted that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U. S., at 75. Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. See *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971); *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since "men [are] as a rule more conversant with business affairs than . . . women."[7] Indeed, appellee maintained that "it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are."[8] And the Idaho Supreme Court, in upholding the constitutionality of this statute, suggested that the Idaho Legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women."[9]

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." *Reed* v. *Reed*, *supra*, at 77. The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Id.*, at 76. This departure from "traditional" rational basis analysis with respect to sex-based classifications is clearly justified.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.[10] Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, exactly 100 years ago, a distinguished member of this Court was able to proclaim:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> ". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *Illinois*, 83 U. S. [16 Wall.] 130, 141 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kanowitz, Women and the Law: The Unfinished Revolution 5–6 (1969); G. Mydral, An American Dilemma 1073 (2d ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"[11]—until adoption on the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades.[12] Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic,[13] women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena.[14] See generally, K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic

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[1] Appellant Joseph Frontiero is a full-time student at Huntingdon College in Montgomery, Alabama. According to the agreed stipulation of facts, his living expenses, including his share of the household expenses, total approximately $354 per month. Since he receives $205 per month in veterans' benefits, it is clear that he is not dependent upon appellant Sharron Frontiero for more than one-half of his support.

[2] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see *Shapiro* v. *Thompson*, 394 U. S. 618, 641–642 (1969); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

[3] The housing provisions, set set forth in 37 U. S. C. § 701 *et seq.*, were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H. R. Rep. No. 770, 81st Cong., 1st Sess.; S. Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in substance the dependency definitions of § 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by § 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision was itself derived from unspecified earlier enactments. See S. Rep. No. 917, 78th Cong., 2d Sess., 4.

The medical benefits legislation, 47 U. S. C. § 601 *et seq.*, was enacted as the Dependents' Medical Care Act of 1956. As such, it was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H. R. Rep. No. 1805, 84th Cong., 2d Sess.; S. Rep. No. 1878, 84th Cong., 2d Sess.

[4] *See Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184, 191–192 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

[5] *See Graham* v. *Richardson*, 403 U. S. 365, 372 (1971).

[6] *See Oyama* v. *California*, 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

[7] Brief of Appellee, at 12, *Reed* v. *Reed*, 404 U. S. 71 (1971).

[8] *Id.*, at 12–13.

[9] *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970).

[10] Indeed, the position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decisionmaking councils. See M. Gruberg, Women in American Politics 4 (1968). See also A. de Tocqueville, Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classic Series 410 (Galaxy ed. 1947).

[11] *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *see Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621, 626 (1969); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

[12] *See generally*, The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A. Montague, Man's Most Dangerous Myth (4th ed. 1964); The President's Commission on the Status of Women, American Women (1963).

[13] *See, e. g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507 (1971).

[14] It is true, of course, that when viewed in the aggregate, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Governments. *See* Joint Reply Brief of Appellants and American Civil Liberties Union (Amicus Curiae) 9.

frequently bears no relation to ability to perform or contribute to society." As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." [9] Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." [10] And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." [11] Thus, Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 240, 248–249 (1970); *Katzenbach* v. *Morgan*, 384 U. S. 641, 648–649 (1966).

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

III

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 2072, 2076, a female member of the uniformed services seeking to obtain housing and medical benefits for her

[9] See, *e. g.*, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1073–1174 (1969).

[10] 47 U. S. C. §§ 206(d)–2 (a), (b), (e). (Emphasis added.) See generally, Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971).

[11] 29 U. S. C. § 206 (d). (Emphasis added). See generally, Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970, 39 U. Cin. L. Rev. 615 (1970).

[11] H. J. Res. No. 208, 92d Cong., 2d Sess. (1972). In conformity with these principles, Congress in recent years has amended federal statutory schemes similar to those presently under consideration so as to eliminate the differential treatment of men and women. See 5 U. S. C. § 2108, as amended, 85 Stat. 644; 5 U. S. C. § 7152, as amended, 85 Stat. 644; 5 U. S. C. § 8341, as amended, 84 Stat. 1961; 38 U. S. C. § 102 (b), as amended, 86 Stat. 1074.

spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." *Reed* v. *Reed*, *supra*, at 77.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.[12] And in light of the fact that the

[12] It should be noted that these statutes are not in any sense designed to remedy the effects of past discrimination against women. See *Gruenwald* v. *Gardner*, 390 F. 2d 591 (CA2 1968), cert. denied, 393 U. S. 982 (1968); cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). On the contrary, these statutes rest upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping an additional economic disadvantage. Cf. *United States* v. *Guston County*, 395 U. S. 285, 296–297 (1969).

[13] In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full-time 12 months per year. See U. S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W. B. Pub. No. 71-191, March 1972). Moreover, 41.5% of all married women are employed. See U. S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971 4 (Summary Special Labor Force Report, August 1972). It is also noteworthy that, while the median income of a male member of the armed forces is approximately $4,696, see The Report of the President's Commission on an All-Volunteer Armed Force 54, 181 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States Table No. 355 (1972). Applying the

dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process," the Government's explanation of the statutory scheme is, to say the least, questionable.

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Reed* v. *Reed*, *supra*, at 77, 76. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband."

Reversed.

MR. JUSTICE STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U. S. 71.

MR. JUSTICE REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero* v. *Laird*, 341 F. Supp. 201 (1972).

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against service women in

statutory definition of "dependency" to these statistics, it appears that, in the "median" family, the wife of a male member must have personal expenses of approximately $4,474, or about 78% of the total family income, in order to qualify as a "dependent."

[14] Tr. of Oral Arg. 27–28.

[15] As noted earlier, the basic purpose of these statutes was to provide fringe benefits to members of the uniformed services in order to establish a compensation pattern which would attract career personnel through re-enlistment. See n. 3, *supra*, and accompanying text. Our conclusion in no way invalidates the statutory scheme except insofar as they require a female member to prove the dependency of her spouse. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Moritz* v. *Commissioner of Internal Revenue*, — F. 2d — (CA10 1972). See also 1 U. S. C. § 1.

violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of MR. JUSTICE BRENNAN, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Supra*, at 5. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Reed* v. *Reed*, 404 U. S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

JOSEPH J. LEVIN, JR., Montgomery, Ala. (MORRIS S. DEES, JR., with him on the brief) for appellants, and RUTH BADER GINSBURG, New York, N.Y. (MELVIN L. WULF, BRENDA FEIGEN FASTEAU, and MARC FEIGEN FASTEAU, with him on the brief) for American Civil Liberties Union, as amicus curiae, for appellants; SAMUEL HUNTINGTON, Assistant to the Solicitor General (ERWIN N. GRISWOLD, Solicitor General, HARLINGTON WOOD, JR., Assistant Attorney General, MARK L. EVANS, Assistant to the Solicitor General, WALTER H. FLEISCHER and ROBERT S. GREENSPAN, Justice Dept. attorneys, with him on the brief) for appellees.

JUN 11 2 05 PM '73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	CIVIL ACTION
VERSUS	NO. 73-688
HON. EDWIN EDWARDS, ET AL.	SECTION "C"

MEMORANDUM FOR DEFENDANTS WITH RESPECT TO DEFINITION OF THE CLASSES AND ABSENCE OF NOTICE REQUIREMENT

A. Class Definition

With respect to the definition of the classes which plaintiffs purport to represent, defendants recognize and acquiesce to the validity of the female class which is composed of all female residents of the Twenty-Second Judicial District who are eligible for jury service under Article 401 of the Louisiana Code of Criminal Procedure, but who are exempted from such service under Article 402.

Therefore, because the relief requested by this class will, if granted, dispose of the issues and relief prayed for by the male class and the female sub-class, defendants believe that no useful purpose would be served by requiring further definition of the class.

B. Class Notice

With respect to whether or not notice to the members of the class is required, defendants agree with plaintiffs, for the reasons set forth in their brief, that notice in this case would serve no purpose because withdrawl from the class is not an option for class members and the relief requested is for declaratory judgment and not money damages. Therefore, defendants do not object to

dispensing with notice requirements to the class members in this particular case.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

ROBERT L. DANNER
SPECIAL COUNSEL

Dale C. Wilks

DALE C. WILKS
SPECIAL COUNSEL

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 8th day of June, 1973

Dale C. Wilks

U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Jun 12 8 51 AM '73
BENJAMIN W. REIS
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL. PLAINTIFFS	*	CIVIL ACTION
VERSUS	*	NO. 73-688
HON. EDWIN EDWARDS, ET AL. DEFENDANTS	*	SECTION "C"

* * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT.

Plaintiffs, throughout their memorandum, continuously refer to the "exemption" from jury service given to women under Louisiana law as an "exclusion". This random interchanging of terms is not only misleading but also based on the erroneous supposition that "exemption" and "exclusion" have one in the same meaning. The "exemption" from jury service which is provided for in Article 402 of the Code of Criminal Procedure, LSA-R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921 does not in any way exclude or deprive women of their right to serve on juries. This assertion is also supported by the fact that the law specifically prohibits discrimination in the drawing and selection of juries on the basis of sex as set forth in LSA-R.S. 13:3056:

> "In the drawing and selection of juries in civil cases no distinction shall be made against any person on account of sex when such person meets the requirements set forth in R.S. 13:3055."

Plaintiffs cite Carter v. Jury Commission, 396 US 320 (1969) Peters v. Kiff, 407 US 493 (1972) and Apodaca v. Oregon, 406 US 404 (1972) in which cases the "exclusion" of identifiable segments

of the community from jury panels and from the juries ultimately drawn from those panels was held to be a violation of equal protection both for the litigants tried by discriminatorily selected juries and for members of the group discriminated against. These cases, however, involved the "exclusion" of certain groups through discriminatory methods which prevented persons from exercising their right to serve on juries. This is not the case with the "exemption" granted to women under Louisiana law, since those women who want to serve on juries are free to register with the clerk of court and thereby subject themselves to jury duty. Hence, the difference in effect between the Louisiana "exemption" and the "exclusion" of identifiable groups as noted in Carter, Kiff and Apodaca, cited supra, is obvious - the Louisiana exemption does not prohibit any woman who wants to from participating in jury duty. (emphasis supplied).

Plaintiffs rely strongly on Reed v. Reed, 404 US 71, and Fontiniero v. Richardson, 41 Law Week 4609, to support the assertion that dissimilar treatment for men and women who are similarly situated is unconstitutional. However, the Court in Reed v. Reed, supra, recognized that dissimilar treatment of different classes of persons is not unconstitutional if the "classification is reasonable, not arbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation". Also, in Fontiniero v Richardson, supra, the Court recognized that dissimilar treatment for men and women could be constitutional even applying the test of "strict judicial scrutiny":

> "In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to

"determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits."

In the instant case, even applying the test of"strict judicial scrutiny" , the exemption from jury duty which is granted to women under the Louisiana law is "reasonable and rests on some ground of difference having a fair and substantial relation to the object of the legislation", Reed v. Reed, 404 US 71. This conclusion is supported by the Supreme Court's ruling in Hoyt v. Florida, 368 US 57, 82 S.Ct. 159 (1961), which recognized the "exemption" of women from jury service not to be an "exclusion" but rather "a privilege"... "based upon a reasonable classification...". In view of the above, defendants maintain that plaintiffs have failed to state a claim upon which relief can be granted and consequently their complaint should be dismissed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

ROBERT L. DANNER
SPECIAL COUNSEL

Dale C. Wilks

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527-8375

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 8th day of June, 1973

Dale C. Wilks

...TES DISTRICT COURT — Jury demand date: — 73,688 4

TITLE OF CASE	ATTORNEYS
...SHA B. HEALY, ...ZANNE D. HILL, ...ROLYN HALL, ...NDA WALZ, ...ARLES W. HILL, ...RRY A. WALZ and ...HN J. HEALY	For plaintiff: William E. Rittenberg Debra Millenson George Strickler American Civil Liberties Union of La. 606 Common St. N.O.,LA. 522-0617 - 525-4321 Ruth Bader Ginsburg American Civil Liberties Union 22 East 40th St. N.Y., N.Y. 10016 SYLVIA ROBERTS NOW LEGAL DEFENSE AND EDUCATION FUND P.O. Box 3081 Baton Rouge, La.
...N. EDWIN EDWARDS, GOVERNOR OF LA., ...N. THOMAS W. TANNER, ...N. WALLACE A. EDWARDS, ...N. HILLARY J. CRAIN, Judges of the ...ad Judicial District Court, ...FUSSELL, ...B. CROW, ...LLY W. WEAVER, ...BERT FITZMORRIS, ...CTOR GRANTHAM: all defts are sued ...th in their official and individual ...acities	For defendant: Warren E. Mouledoux First Asst. Atty. General State Capitol Baton Rouge, La. Dale C. Wilks Robert L. Danner, Jr. 234 Loyola Ave. Room 815 N.O., LA.

WED., JUNE 13, 1973 9:00 AM

MTN OF DEFTS TO DISMISS -
PLTFS CROSS MOTION FOR SUMMARY JUDGMENT

These motions are to be decided by the Three Judge Court.

MTN TO INTERVENE BY SHIRLEY ANN ROBINSON AND JENNY LEE SMITH BAGGETT

Granted. Mr. George Strickler to prepare order.

Counsel to file a stipulation by 5 PM on June 22 or hearing set for July 6 will be cancelled. A brief pre-trial order is to be filed by June 22, 1973.

JUN 20 1973

Jun 25 1 37 PM '73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, et al., Plaintiffs	)	CIVIL ACTION
v.	)	NO. 73-688
HON. EDWIN EDWARDS et a.., Defendants.	)	SECTION "C"

PRE-TRIAL ORDER

Jurisdiction

This Court for jurisdiction of this action pursuant to 28 U. S. C. § 1343 (3) and (4).

Class Action

This is a class action within the terms of Rule 23(L) (2) of the Federal Rules of Civil Procedure. The two classes and one sub class are defined in paragraph 5 of the Amended Complaint and Complaint In Intervention.

Pending Motions

Defendants have moved to dismiss the action. Plaintiffs have moved for summary judgment.

Issues of Fact

There are no contested issues of fact. The parties have entered into a stipulation of facts for submission to the Court.

Issues of Law

(a) Plaintiffs' and Plaintiff's-intervenors' Formulation:

1. Whether the plaintiffs and plaintiffs-intervenors have standing to prosecute this action.

2. Whether the differential treatment of men and

women compelled by Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13 Article 3055, and Section 41 of Article 7 of the Louisiana Constitution constitutes invidious discrimination in violation of the Fourteenth Amendment to the United States Constitution.

(b) Defendants' Formulation

1. Does the sub-class of male plaintiffs suffer immediate injury or the threat of immediate injury to give them standing to attack the constitutionality of the mandatory jury service, as being violative of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

2. Does the " exemption" from mandatory jury service which is given to women under Louisiana law constitute an ' exclusion" within the meaning fo the Supreme Court's ruling in Carter v. Jury Commissioners, 396 U. S. 320 (1969), so as to give plaintiffs standing to allege a deprivation of rights guaranteed under the Sixth Amendment to the United States Constitution.

3. Is the "exemption" from mandatory jury service which is given to women under Louisiana law a dissimilar treatment of different classes of persons which is reasonable, not arbitrary and rests on some ground of difference having a fair and substantial relation to the object of the legislation so as to withstand the test of "strict judicial scrutiny" and not violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

UNITED STATES DISTRICT JUDGE

Counsel for Plaintiffs and Plaintiffs-Intervenors

Counsel for Defendants

Jun 25 1 37 PM '73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

MARSHA B. HEALY, ET AL.	•	CIVIL ACTION
Plaintiffs	•	NO. 73-688
versus	•	SECTION "C"
HON. EDWIN EDWARDS, et al.	•	
Defendants	•	

STIPULATION OF FACTS

Plaintiffs, plaintiffs-intervenors, and all defendants in the above cause, through their respective counsel, do hereby stipulate and agree, subject to objection by any party as to relevance, competency and materiality, as follows:

1.) The Jury Commissions of St. Tammany Parish and Washington Parish, whose members are defendants herein, comply with all provisions of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statute, Title 13, Article 3055 and Article 7, Section 41 of the Louisiana Constitution of 1921. Female residents of St. Tammany and Washington Parishes who are eligible for jury service under the standards of Article 401 of the Louisiana Code of of Criminal Procedure are not included in the general venires or jury wheels of the parishes unless they individually make written requests to their respective

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Jury Commissions to be so included.

2.) Each of the female plaintiffs and female plaintiffs-intervenors is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041. None have filed requests to be placed in the general venires of their respective parishes and none have been so included.

3.) Plaintiff-intervenor Baggett has filed a civil damage action in the Twenty-Second Judicial District Court in Washington Parish and has requested a jury trial. Plaintiff-intervenor Robinson is preparing to file a civil damage action in St. Tammany Parish. She will request a jury trial.

4.) Each of the male plaintiffs is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041.

5.) Fifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and in Washington Parish is female.

6.) In St. Tammany Parish no more than ten percent (10%) of the persons in the general venire or jury wheel are female. In recent years the following jury drawings have been made:

November 22, 1971. Fifty (50) names for Grand Jury to serve first six months of 1972. Two (2) women drawn.

December 8, 1971. Two Hundred (200) names for jury term beginning January 10, 1972. One (1) woman drawn.

January 7, 1972. Two hundred (200) names for jury term beginning March 13, 1972. No women drawn.

February 28, 1972. One hundred (100) names for jury term beginning April 3, 1972. Two (2) women drawn.

February 28, 1972. Two hundred (200) names for jury term beginning April 13, 1972. One (1) woman drawn.

March 17, 1972. Two hundred (200) names for jury term of May 8, 1972. Two (2) women drawn.

April 11, 1972. Seventy-five (75) names for jury term of April 13, 1972. No women drawn.

May 22, 1972. One hundred-fifty (150) names for jury term of July 10, 1972. No women drawn.

June 15, 1972. Fifty (50) names for Grand Jury term for next six months. No women drawn.

July 26, 1972. Two hundred (200) names for jury term of September 11, 1972. Two (2) women drawn.

August 25, 1972. Two Hundred (200) names for term of October 9, 1972. Two (2) women drawn.

September 28, 1972. Two hundred (200) names for jury term of November 13, 1972. Two (2) women drawn.

November 3, 1972. Seventy-five (75) names for jury term of December 18, 1972. No women drawn.

December 4, 1972. Fifty (50) names for Grand Jury term of next six months. One (1) women drawn.

7.) If called to testify, Dewaine Seal, the Clerk of Court of Washington Parish, would testify that to his knowledge, no more than two women in Washington Parish have requested that they be made eligible for jury service and that only on one occasion has a woman been included in a petit jury venire.

8.) The discrepancies between the percentages of women in the populations of persons eligible for jury service in St. Tammany and Washington Parishes and the percentages of women actually included in the venires of those parishes is the result of the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13, Article 3055 , and Article 7, Section 41 of the Louisiana Constitution of 1921.

COUNSEL FOR PLAINTIFFS AND
PLAINTIFFS-INTERVENORS

Dated: June , 1973

COUNSEL FOR DEFENDANTS

Jun 28 11 26 AM '73
BENJAMIN C. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, on behalf of themselves and other similarly situated, Plaintiffs,	
SHIRLEY ANN ROBINSON and JENNY LEE SMITH BAGGETT, on behalf of themselves and others similarly situated, Applicants for Intervention,	CIVIL ACTION NO. 73-688
versus	SECTION "C"
EDWIN EDWARDS, Governor of Louisiana; THOMAS W. TANNER, WALLACE A. EDWARDS and HILLARY J. CRAIN, Judges of the Twenty Second Judicial District; DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM, Members of the Jury Commission of St. Tammany Parish; JOHN WOOD, MARVIN WILLIAMS, HAROLD FOIL and DEWAINE SEAL, Members of the Jury Commission of Washington Parish, Defendants	

ORDER

Upon consideration of the Motion to Intervene filed by Shirley Ann Robinson and Jenny Lee Smith Baggett and the Motion to Join Parties Defendant and to Amend Complaint filed by both the applicants for intervention and the

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original plaintiffs and there being no opposition to these motions by the defendants,

IT IS HEREBY ORDERED that Jenny Lee Smith Baggett and Shirley Ann Robinson be allowed to intervene in this action as parties plaintiff and that John Wood, Marvin Williams, Harold Foil, Preston Varnado and Dewaine Seal, all members of the Jury Commission of Washington Parish, be joined as parties defendant,

IT IS FURTHER ORDERED that plaintiffs and plaintiff intervenors be allowed to file their Amended Complaint and Complaint In Intervention in this action.

The Court has determinted that this is a proper class action and that the two classes and one sub-class as described in the Amended Compalint and Complaint in Intervention are properly defined. Since the classes and sub-class meet the requirements of Rule 23(b)(2) of the Federal Rules and since no party has suggested any reason why notice should be given to the class members, such notice will not be required.

UNITED STATES DISTRICT JUDGE

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
AUG 31 1973
FILED
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, Plaintiffs	*	CIVIL ACTION NO. 73-688 SECTION "C" (THREE-JUDGE COURT CASE)
versus	*	
HON. EDWIN EDWARDS, GOVERNOR OF LA., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities, Defendants	*	

George Strickler, Esq.
New Orleans, La.
Ruth Bader Ginsburg, Atty.
New York, New York
Sylvia Roberts, Atty.
Baton Rouge, La.
Attorneys for Plaintiffs

Warren E. Mouledoux, Esq.
Baton Rouge, La.
Dale C. Wilks, Esq.
Robert L. Danner, Jr., Esq.
New Orleans, La.
Attorneys for Defendants

RUBIN, District Judge:

The Louisiana Constitution[1] and statutes[2] exempt women from service on juries unless they file a written declaration of their desire to serve. This benign dispensation has resulted in jury panels that, in the parishes here involved, have never included more than five percent females, and frequently less. The plaintiffs in this class action seek a declaration that the exemption provisions violate the rights of the class to Equal Protection and Due Process of the Law, and an injunction against

DATE OF ENTRY AUG 31 1973

continued enforcement of these laws.

I.

Three separate classes of suitors join in the attack: (a) one comprises all females in the named parishes; these women contend that both their right to serve on juries and their opportunity, should occasion arise, to litigate before juries is abridged; (b) another comprises all males in those parishes; these men contend that they are subject to more onerous jury service because similarly situated females are not required to serve; and (c) the third, the intervening class, is composed of female litigants in civil cases in state court; these contend they are deprived of a jury of their peers.

Because the jurisdiction of federal courts is limited by the Constitution to "Cases" and "Controversies," Art. III, Sec. 2, U.S. Constitution, they may not issue merely advisory opinions concerning the constitutionality of legislation, federal or state. Indeed the power to declare a statute unconstitutional is deduced from the necessity of determining its validity in order to decide a particular case or controversy.

A case, in the constitutional sense, must present a real controversy. A statute may be attacked as unconstitutional only by someone who has sustained or is in immediate danger of sustaining some direct injury from its enforcement. It does not suffice to show that one is injured merely as a member of the body politic. Frothingham v. Mellon, 1923, 262 U.S. 447, 43 S.Ct. 597.

This is what is meant by standing to sue, the requirement that, to justify attack on legislation, a litigant be able to show injury by the statute, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of value interests of concerned bystanders." United States v. SCRAP, 1973, ___U.S.___, ___S.Ct.___ (slip op. at p.16).

In SCRAP, only a few weeks ago, the Supreme Court focused

the light of the decisions on standing: the test is whether the litigant can show "injury in fact," that he has been or will in fact be "perceptibly harmed." The litigants in SCRAP met that test by alleging a "specific and perceptible harm that distinguished them from other citizens."

It is not necessary that the harm be great or substantial; it suffices that it be small, indeed a trifle, so long as it distinguishes a person with a direct stake in the outcome of the litigation from a person with a mere interest in the problem. SCRAP, ___U.S. at ___, ___ S.Ct. at ___, and note 14 (slip op. at p. 18).

We pretermit the question whether all females as a class suffer a specific and perceptible harm when required to write a letter in order to serve on juries or whether the greater burden of jury service imposed on males by the virtual exemption of females from jury duty is a palpable enough trifle. Together these two classes -- all women and all men -- comprise the entire adult citizenry, and they allege in effect a harm to the body politic. It may be questioned whether, if the entire citizenry is aggrieved by official action, they may seek judicial relief instead of following the political route accorded by the democratic process.

But there is a class of persons joined in prosecuting this suit who have both a direct and a personal interest: the intervenors representing women who have suits pending in state court.

Litigants have standing to allege the unconstitutionality of a statute or practice that potentially denies their right to Due Process of Law by interfering with fair jury selection.[3/] The intervenors' standing to sue gives justiciability to the entire case. "[A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323, 328-329. Accord: Atkins v. State Board of Education, 4 Cir. 1969, 418 F.2d 874, 876; Hackner v. Guaranty Trust Co., 2

Cir. 1941, 117 F.2d 95, 98.

The intervenors represent, through Ms. Baggett, females actually engaged in litigation in state courts. To deprive them of a jury comprising a fair cross section of the population, including females, is a claim of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 1969, 394 U.S. 103, 89 S.Ct. 956, 959. "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection." Carter v. Jury Commission, 1970, 396 U.S. 320, 90 S.Ct. 518, 523.

It is unnecessary to probe whether these litigants would have standing to challenge the provisions of the Louisiana Code of Criminal Procedure for jury selection in criminal cases, were that issue presented alone. Their right to challenge the Louisiana constitutional provision having been established, the issue of the entire scope of jury selection in all kinds of cases appears to be inescapably involved.

II.

Only twelve years ago, in Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, the Supreme Court upheld the constitutionality of a Florida statute almost identical to the challenged provisions of the Louisiana Constitution. That decision was followed in Leighton v. Goodman, S.D.N.Y. 1970, 311 F.Supp. 1181, and United States v. Caci, 2d Cir. 1968, 401 F.2d 664. Hoyt rested on the finding that Florida's statute was based on a reasonable classification and the venerable dictum in Strauder v. West Virginia, 1879, 100 U.S. 303, 310, unchallenged for eighty years, that a State may constitutionally confine jury duty "to males."

But the ground on which Strauder stood was eroded by Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, and crevassed by Frontiero v. Richardson, 1973, ___U.S.___, 93 S.Ct. 1764. In Reed the court held that an Idaho statute violated the Equal Protection Clause in providing that, when two individuals are

otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. By according different treatment to applicants on the basis of their sex, the statute "establishes a classification subject to scrutiny under the Equal Protection Clause." Reed, supra, 92 S.Ct. at 253.

"The Equal Protection Clause...[denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." (Emphasis supplied.) Id. at 253-54. By ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are thus similarly situated." Id. at 254.

While only four justices were willing in Frontiero to conclude that classifications based upon sex "are inherently suspect," seven justices agreed that it was unconstitutional for Congress, solely for administrative convenience, to deny a female member of the uniformed services the right to claim her spouse as a dependent for the purposes of obtaining increased quarters allowances and medical and dental benefits without proving his actual dependency, while according this right to males with respect to female dependency. Three concurring justices found that Reed "abundantly supports our decision today." ___U.S. at ___, 93 S.Ct. at 1773.

The minimum requirement of Equal Protection, then is that dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated with respect to the objectives of the legislation. The objective of the state legislation here attacked is the method of selecting juries. The state does not contend that there is any difference between males and females with respect to their qualifications or competency as jurors. Nor could it do so, for women's full competency is

demonstrated by their complete acceptability if they volunteer. Hence the state constitutional provision patently fails to meet the requirements of Equal Protection for women as potential jurors. Female litigants having standing to sue can properly raise this issue which applies to women as a class.

Female litigants are also denied Equal Protection by being compelled to have their cases decided by juries composed entirely or predominantly of males. If this were proper sauce for geese, there might be gander gravy too: states might with equal logic grant jury exemptions only to all male wage earners who do not ask to serve, with the result that litigants, male and female, would be compelled in practice to submit to verdicts by predominantly female juries. Males might then properly question whether they were being afforded Equal Protection of the laws.[4/]

The Nineteenth Amendment brought women the right to vote, and freed them from strictures that had 43 years earlier been lifted from those males who had formerly been denied the franchise because of race. In the half century since then, women have moved in increasing numbers from hearthside into the world of work and business and politics. Forty percent of the American work force is female.[5/] Over 57% of all American women between the ages of 20 and 24, and 45% of those between 25 and 34, are in the wage earning work force.[6/]

Louisiana's continued subscription to the notion that women must be shielded from jury duty, unless they choose to volunteer, results in juries that are predominantly male. Whether favorable or unfavorable to females, the sexual prejudice implicit in the thesis that women are entitled to an exemption not accorded men imparts to the jury a potential prejudice, be it ever so subtle or intangible, that is real and meaningful. Compare Justice Murphy's dissenting opinion in Fay v. N.Y., 1947, 332 U.S. 261, 300, 67 S.Ct. 1613, 1633.

III.

Litigants, male or female, have a constitutional right to trial by an impartial jury drawn from a cross section of the community. The "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 220, 66 S.Ct. 984, 985. Since this is inherent in Due Process of Law, the denial may be challenged not only by a litigant who is a member of a class excluded from representation,[7/] but even by one whose right to an impartially selected jury is biased by disproportionate partiality to a class that includes him. Peters v. Kiff, 1972, ___U.S.___, 92 S.Ct. 2163.

Peters held that a white defendant might challenge discrimination against black jurors. The opinion illuminates that the arbitrary exclusion of any well-defined class of citizens offends a number of related constitutional values:

-- the members of the class excluded are denied Equal protection:

-- potential jurors are denied the "privilege of participating equally...in the administration of justice;" and

-- "it stigmatizes the whole class,[of those excluded] even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority;'"

-- "exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community." Id. at 2167.

The court concluded:

> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
>
> * * * * *
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has a relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. Id. at 2169.

Females, as individuals, bring to juries "qualities of human nature and varieties of human experience," entirely different from those of males, and a diversity of temperament, among themselves, completely heterogeneous. Their absence from jury panels is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience, indispensable if the jury is to comprise a cross-section of the community.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," the Supreme Court declared in Smith v. Texas, 1941, 311 U.S. 128, 130, 61 S.Ct. 164, 165, referring to the exclusion of jurors based on race. In like tenor, referring to the exclusion of wage earners, in Thiel v. Southern Pacific Company, 1946, 328 U.S. 217, 223, 66 S.Ct. 987, the Court commented that the excluded class "constitute[s] a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system."

A jury panel that is almost entirely male, whether because females are excluded or because they serve only if they volunteer and almost none step forward, cannot be "truly representative of the community," / and women's absence does "violence to the democratic nature of the jury system." The jury must not merely mirror the American male, just as it must not reflect the views of only one race or one stratum of society.

Due Process insists upon the integrity of the jury system. There may be no constitutional requirement that a state proceed by grand jury indictment, Hurtado v. California, 1884, 110 U.S. 516, 4 S.Ct. 111. But when prosecution is initiated by indictment, the state may not impose a discriminatory pattern in

selecting the jury. Hill v. Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159.

Similarly, it is unnecessary to search the limits of the Constitution for a right to jury trial in civil cases. "Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring that the selection of membership is free from racial bias," Carter v. Jury Commission of Green County, 1970, 396 U.S. 320, 330, 90 S.Ct. 518, 523-24, and, we add, every other type of unconstitutional discrimination. 8/

IV.

Nor must this court await the day when the Supreme Court itself has occasion to reconsider and overrule Hoyt.

"This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." Rowe v. Peyton, 4 Cir. 1967, 383 F.2d 709, 714, affirmed 391 U.S. 54.

This also was the view of the Second Circuit, in Perkins v. Endicott Johnson Corp., 2 Cir. 1942, 128 F.2d 208, where Judge Frank pointed out that, for lower courts to continue to hold stubbornly to barren precedent would stultify them and unnecessarily burden the Supreme Court. See also In re Korman, 7 Cir. 1971, 449 F.2d 32, reversed by the Supreme Court because the Seventh Circuit incorrectly concluded that earlier doctrine had been discarded, 92 S.Ct. 2055; Browder v. Gayle, M.D. Ala. 1956, 142 F.Supp. 707, affirmed 352 U.S. 903, and cases cited therein; contra Ward v. Luttrell, E.D. La. 1968, 292 F.Supp. 162; Fishkin v. United States Civil Service Commission, N.D. Calif., 1968, 309 F.Supp. 40, appeal dismissed, 1970, 396 U.S. 278, 90 S.Ct. 557; see Comment (1941) 50 Yale Law Journal 1448, 1450.

When today's vibrant principle is obviously inconflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that Hoyt is no longer binding.

V.

Because the Louisiana Constitution denies all litigants Due Process of Law and deprives female litigants of their right to Equal Protection by according an exemption from jury service to women on a basis different from that available to men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service, we declare it and the statutes enacted pursuant to it unconstitutional.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

R Beer
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
August 31, 1973.

1/ La. Const. Art. VII, §41.

2/ Under the authority of the state constitutional provision, separate statutes allow the exemption in civil and in criminal cases: LSA-R.S. 13:3055; La. Code of Criminal Procedure, Art. 402.

3/ "[A] plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." National Student Association v. Hershey, D.C. Cir. 1969, 412 F.2d 1103, 1110.

4/ Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261, a federal criminal case tried in California, where no women were included on the panel of grand and petit jurors, is not directly applicable. But the court found the "purposeful and systematic exclusion" of women invalid, and observed:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men--personality, background, economic status--and not sex. Yet is is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.
>
> To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." 329 U.S. at 193, 67 S.Ct. at 264.

5/ See Lexcen, The Equal Rights Amendment, 31 Federal Bar Journal 247, 250-51; U.S. Dept. of Labor, Women's Bureau, Underutilization of Women Workers, 1971 (revised), p. 1.

6/ U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1972. Table No. 341, at p. 217.

7/ Whitus v. Georgia, 1967, 385 U.S. 545, 87 S.Ct. 643; Avery v. Georgia, 1953, 345 U.S. 559, 73 S.Ct. 891; Norris v. Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579; Carter v. Texas, 1900, 177 U.S. 442; Strauder v. West Virginia, 1879, 100 U.S. 303 (black defendants challenging discrimination against black jurors).

8/ The Supreme Court has considered the requirements of the Constitution with respect to the manner of selecting juries in a number of cases. It would be mere pedantry to review them all. But the landmarks stand high and clear.

In Glasser v. United States, 1942, 315 U.S. 60, 85-86, 62 S.Ct. 457, 471-472, Justice Murphy wrote, with respect to the selection of federal juries:

> "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;' the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.
>
> * * * * *
>
> But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly

representative of the community.'" Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

In that case the federal jury commissioner had included only those women whose names were on a list supplied by the Illinois League of Women Voters, and prepared exclusively from its membership. The court found this to be unconstitutional. The officials charged with choosing federal jurors,

> "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." Ibid.

See Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261 (women systematically excluded from grand jury); Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 66 S.Ct. 984 (all persons who worked for daily wage intentionally excluded from jury lists); Labat v. Bennett, 5 Cir. 1966, 365 F.2d 698 (wage earners systematically excluded from jury); State v. Madison, 1965, 240 Md. 265, 213 A.2d 880 (non-theists excluded from jury); Simmons v. State, Fla. 1966, 182 So.2d 442 (common laborers systematically excluded).

Compare Fay v. People of the State of New York, 1947, 332 U.S. 261, 67 S.Ct. 1613, where the court rejected a challenge to state jury selection methods that resulted in blue ribbon juries as not violative of equal protection or due process, distinguishing the cases involving exclusion based on race as based on violation of federal legislation, 8 U.S.C.A. §44 designed to enforce the Fourteenth Amendment.

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
AUG 31 1973
FILED
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY,
SUZANNE D. HILL,
CAROLYN HALL,
LINDA WALZ,
CHARLES W. HILL,
JERRY A. WALZ and
JOHN J. HEALY

VERSUS

HON. EDWIN EDWARDS, GOVERNOR OF LA.,
HON. THOMAS W. TANNER,
HON. WALLACE A. EDWARDS,
HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM; all defendants
are sued both in their official and individual capacities

CIVIL ACTION

NO. 73-688

SECTION "C"

JUDGMENT

This matter came on for hearing on a previous day, and for the written reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards, Governor of La., Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Court, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional.

Dated at New Orleans, Louisiana, this 31st day of August, 1973.

BENJAMIN W. REISCH, CLERK

By: Nelson B. Jones
NELSON B. JONES, CHIEF DEPUTY CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

FEE
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X CHARGE
INDEX

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
SEP 6 1973
FILED
BENJAMIN W. REISCH
CLERK

MINUTE ENTRY
SEPTEMBER 4, 1973
RUBIN, J.

MARSHA B. HEALY, ET AL — CIVIL ACTION

versus — NO. 73-688

HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, ET AL — SECTION "C"

(THREE-JUDGE COURT CASE)

***

The August 31, 1973 opinion is amended as follows:

Defendants are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

RB Beal
UNITED STATES DISTRICT JUDGE

8-6-73

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SEP 10 9 59 AM '73
BENJAMIN W. REISCH
CLERK

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY, Plaintiffs	)	CIVIL ACTION
versus	)	NO. 73-688
HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities, Defendants	)	SECTION "C" (THREE-JUDGE COURT CASE)

MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Defendants, through the Honorable William J. Guste, Jr. move this court pursuant to Rule 62(C) of the Federal Rules of Civil Procedure to order a stay of the execution of judgment rendered in this action on August 31, 1973, pending said defendants' appeal from said judgment to the Supreme Court of the United States; and, as grounds for said motion, the defendants say:

1. That the defendants will suffer irreparable injury in the loss of time of its officers, agents, and employees and expenses to be incurred by the defendants in compiling respective lists of all the eligible women in Louisiana for jury service as ordered by the Court's said judgment, in the event that said judgment is reversed upon the defendants' said appeal therefrom;

2. That the defendants will suffer irreparable injuries in complying with the injunction decreed by the Court's final judgment, in the event said judgment is reversed on the defendant's said appeal therefrom.

WHEREFORE, defendants pray that this Court order a stay of the execution of its judgment rendered in this action on August 31, 1973, pending defendant's appeal to the Supreme Court of the United States.

RESPECTFULLY SUBMITTED:

WILLIAM J. GUSTE, JR.
Attorney General

Warren E. Mouledoux
WARREN E. MOULEDOUX
First Assistant Attorney General

Robert L. Danner, Jr.
ROBERT L. DANNER, JR.
Special Counsel
2-3-4 Loyola Bldg. - 7th Floor
234 Loyola Avenue
New Orleans, Louisiana 70112
527-8375

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 5th day of September, 1973

Robert L. Danner, Jr.

ORDER

The defendants having moved for a stay of execution of, or any proceedings to enforce, the judgment entered in the above entitled cause pending the defendants' appeal to the Supreme Court of the United States.

IT IS ORDERED that execution of, or any proceedings to enforce, said judgment be and the same is hereby stayed until the defendants' appeal to the Supreme Court is disposed of.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 5th day of September, 1973

Robert L. Danner, Jr.

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED SEP 7 1973

BENJAMIN W. REISCH
CLERK

MINUTE ENTRY
SEPTEMBER 7, 1973
RUBIN, J.

MARSHA B. HEALY,
SUZANNE D. HILL,
CAROLYN HALL,
LINDA WALZ,
CHARLES W. HILL,
JERRY A. WALZ and
JOHN J. HEALY

CIVIL ACTION

NO. 73-688

SECTION "C"

versus

HON. EDWIN EDWARDS, GOVERNOR
OF LOUISIANA,
HON. THOMAS W. TANNER,
HON. WALLACE A. EDWARDS,
HON. HILLARY J. CRAIN, Judges
of the 22nd Judicial District
Court,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM; all defendants
are sued both in their official
and individual capacities

***

In the opinion dated August 31, 1973, on page 5, paragraph 3, line 3, "seven" should be "eight".

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

R Bue
UNITED STATES DISTRICT JUDGE

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DATE OF ENTRY 9-10-73

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED 9-7-73

BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY,
SUZANNE D. HILL,
CAROLYN HALL,
LINDA WALZ,
CHARLES W. HILL,
JERRY A. WALZ and
JOHN J. HEALY

CIVIL ACTION

NO. 73-688

SECTION "C"

VERSUS

HON. EDWIN EDWARDS, GOVERNOR
OF LA.,
HON. THOMAS W. TANNER,
HON. WALLACE A. EDWARDS,
HON. HILLARY J. CRAIN, Judges
of the 22nd Judicial District
Court,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM; all defendants
are sued both in their official
and individual capacities

AMENDED JUDGMENT

The Judgment of August 31, 1973 is amended to read as follows:

"This matter came on for hearing on a previous day, and for the written reasons on file herein,

"IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards, Governor of Louisiana, Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Cou-t, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional and defendants are hereby enjoined from enforcing

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DATE OF ENTRY 9-10-73

the constitutional and statutory provisions declared to be unconstitutional."

Dated at New Orleans, Louisiana, this 7th day of September, 1973.

John Minor Wisdom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

R B Beer
UNITED STATES DISTRICT JUDGE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
Sep 18 2 16 PM '73
BENJAMIN W. REISCH
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A WALZ and JOHN J. HEALY, Plaintiffs,	)	
versus	)	CIVIL ACTION
HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A.B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities, Defendants	)	NO. 73-688 SECTION "C" (THREE-JUDGE COURT CASE)

NOTICE OF APPEAL

Defendants, Honorable Edwin Edwards, Governor of Louisiana, et al., through the Honorable William J. Guste, Jr., pursuant to 28 U.S.C.A. §1253, hereby give notice of their appeal to the Supreme Court of the United States from the Court's judgment entered on September 4, 1973.

RESPECTFULLY SUBMITTED:

WILLIAM J. GUSTE, JR.
Attorney General

Warren E. Mouledoux
WARREN E. MOULEDOUX
First Assistant Attorney General

FEE $ 5.00
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(B)

Robert L. Danner, Jr.
ROBERT L. DANNER, JR.
Special Counsel

Dale C. Wilks
DALE C. WILKS
Special Counsel
2-3-4 Loyola Building, 7th Floor
234 Loyola Avenue
New Orleans, Louisiana
527-8375

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 12th day of September, 1973
Robert L. Danner, Jr.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

versus

HON. EDWIN EDWARDS of LOUISIANA
HON. THOMAS W. TANNER,
HON. HILLARY J. CRAIN,
JUDGES OF THE TWENTY-SECOND JUDICIAL DISTRICT COURT,
DELOS FUSSELL,
A. B. CROW,
BILLY W. WEAVER,
ROBERT FITZMORRIS,
VICTOR GRANTHAM;

Defendants,
(All Defendants are sued in their official and individual capacities.)

CIVIL ACTION
NO. 73-688

SECTION "C"

(3-JUDGE COURT CASE)

(TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause, held in the Courtroom, 400 Royal Street, New Orleans, Louisiana, on July 6, 1973, before the HONORABLE JOHN MINOR WISDOM, HONORABLE ALVIN B. RUBIN, and the HONORABLE R. BLAKE WEST, Judges presiding .)

APPEARANCES:

GEORGE M. STRICTLER, JR., ESQ.
1110 Royal Street
New Orleans, Louisiana

AND

MS. RUTH BADER GINGSBERG
ATTORNEYS FOR PLAINTIFFS.

ROBERT DANNER, ESQ.
REPRESENTING The State of Louisiana.

REPORTED BY:

GARY DAVIS
Official Court Reporter

P R O C E E D I N G S

JULY 6, 1973.

JUDGE WISDOM:

Be seated, please.

We have specially fixed today the case of Healy against Edwards.

Will counsel please state their names and whom they represent.

MR. STRICTLER:

My name is George Strictler. I represent the Plaintiffs, and I'd like to introduce to the Court Ms. Ruth Gingsberg. She is a member of the Bar of the State of New York, Second Circuit, and she will argue the case for the Plaintiffs with the Courts' permission.

JUDGE WISDOM:

Very well. We welcome Ms. Gingsberg as counsel.

MR. DANNER:

My name is Robert Danner, and I am here on behalf of the State of Louisiana.

JUDGE WISDOM:

Now, we have a stipulation in the record. Is it also understood and stipulated that this will serve on the hearing for a temporary restraining order and preliminary and permanent injunction?

MR. DAMMER:

Yes.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Is there any evidence to be introduced?

MR. STRICTLER:

No.

JUDGE WISDOM:

Very well.

Let me ask you first how much time will you require for argument?

Did you concur in the stipulation?

MR. DAMMER:

Your Honor, our office originally concurred, however, we would like to point out the points that we would like this court to consider in the stipulation.

JUDGE WISDOM:

Let's do that right now for the record. Let's consider the points you want us to consider in regard to the stipulation.

You do agree that this hearing will serve as the hearing on both the preliminary and permanent injunction?

MR. DAMMER:

Yes, sir.

THE COURT:

All right.

Tell us what you want us to consider.

MR. DAMMER:

Yes.

Your Honor, originally we agreed that there was no question as to Class 2 Plaintiffs in the case. However, with second thought and due consideration, we have determined that there are important issues which this Court should decide.

First of all, in regards to the female plaintiffs, we believe that their class definitely has to be defined for the following reasons:

We believe that there are possibly three classes of female plaintiffs. One class conceivably consists of women who -- who want to be on juries but do not want to have to sign up for such.

The second class we believe are women who want to be on juries and do not mind placing their names on the clerk's list.

The third class we believe are women who do not care to be on juries at all in Louisiana.

For our -- the basis for this is substantiated in the case of Ward vs Luttrell, 292 Fed. Supplemental, 165, 1968, which came out of this district.

THE COURT:

What is the Page number?

MR. DANNER:

Ward vs Luttrell, L-U-T-T-R-E-L-L, 292 Fed. Supplement, 165.

This case was decided from this district in a -- and a member, one of the members of this panel, was a member on that panel which decided that case which dealt with maximum work hours fo. women in Louisiana. The Court found that the class, that the representative party before the Court at that time could not fairly and adequately protect the interest of the class and, therefore, the Court dismissed the class action.

In regard to the male claim, in light of Article 4 of the Louisiana Criminal Code as amended, Section 5, we do not believe that these male plaintiffs represent all the males because Section 5043, Article 403, provides that once you serve on a jury, you have an exemption for three years, which goes against their argument relating to the disportionate burden that they are suffering.

JUDGE WISDOM:

Are you telling me now that you changed your mind about the stipulation as to class?

MR. DANNER:

That's correct, Your Honor.

JUDGE WISDOM:

And that you think that the Plaintiffs are not representative of the class as you would define them, that there are three sub-classes, is that it?

MR. DANNER:

That's correct as in regard to the female plaintiffs.

JUDGE WISDOM:

With regard to the women?

MR. DANNER:

Yes, sir.

JUDGE WISDOM:

And as to the men?

MR. DANNER:

Well, we think there is a question on what class they represent in light of the exemption provided in Article 403, Section 5 of the Louisiana Criminal Code .

JUDGE WISDOM:

In view of the fact that they are exempted for three years if they have served; is that correct?

MR. DANNER:

That's correct.

JUDGE WISDOM:

You would carve out those men as an exception to the class?

MR. DANNER:

Well, I would think --

JUDGE WISDOM:

You would think it would destroy the class?

MR. DANNER:

I would think it would. There is a possibility it might destroy the class.

JUDGE RUBIN:

I want to be sure I understand what you are saying. I don't believe there is any part of the stipulation that relates to the class action, is there?

MR. STRICTLER:

No, sir, there is not, Your Honor.

JUDGE RUBIN:

I think insofar as you suggest that you want to withdraw from something that's stipulated, I don't find anything in the stipulation that is in any way contradicted by anything you have suggested. Now, it's true that, as a preliminary matter and acting within the jurisdiction that I thought reposed in the one judge, who convened in the Court, I did find the matter was appropriate for class action, but that was after notice and a hearing and not based

on a stipulation. Although I think the record will also show there was no objection made at the time. Now, first let's be sure. Is there anything in the stipulation that you wish to withdraw from? Would you examine the stipulation of facts and see if it still represents what is stipulated?

MR. DANNER:

Okay.

MR. STRICTLER:

Your Honor, while Mr. Danner is examining the stipulation, I would like to call the attention of the Court to the fact that at the prior court's hearing defining the class, Defendants filed a memorandum on June 8, and I quote from that memorandum:

" With respect to definition class, that Plaintiffs purport to represent, Defendants recognize and acquiesce to the validity of the female resident of the Twenty-Second Judicial District who are eligible for jury service under Article 401 of the Louisiana Code of Criminal Procedure but who are exempted from serving under Article 406. Therefore, because of the relief requested by this class will, if granted, dispose of the issues of relief prayed for by the male class and female sub-class, Defendants believe that no useful

purpose would be served by requiring further definition of the class."

There was not only no opposition to the Court's ruling in that matter, there was a prior consent, specific consent, that's in the memorandum filed June 8 entitled "Memorandum of Defendants with respect to definition of the classes in absence of notice requirement" --

JUDGE RUBIN:

Mr. Strictler, did you not after that hearing prepare an order?

MR. STRICTLER:

Yes, sir, I did.

JUDGE RUBIN:

I don't seem to find it in the record and I wondered if perhaps the clerk had misplaced it. It seems to me I recall signing it.

MR. STRICTLER:

Yes, sir, the pre-trial order, and that was approved both by myself and Mr. Dale C. Wilks.

JUDGE RUBIN:

In the pre-trial order rather than in a separate order?

MR. STRICTLER:

It's a pre-trial -- there is an order -- oh, I am sorry, Your Honor, not in the pre-trial order, but there--

not only in the pre-trial order, but there is also an order dealing with intervention and definition of class.

JUDGE RUBIN:

That's the order that I had reference to. What is the date on that?

MR. STRICTLER:

Your Honor, I don't have a copy of the order signed, so I don't know what the date is that it was signed.

JUDGE RUBIN:

Do you recall about what date you submitted it?

MR. STRICTLER:

I submitted it on June 22, the day of the deadline.

I also --

JUDGE RUBIN:

All right, I have it. It was filed in the record, I believe, I think I have it here but I will find it.

MR. STRICTLER:

And, Your Honor, the second paragraph of the pre-trial order, which is an agreed order between myself and Mr. Wilcox of Mr. Danner's office, we reached an agreement which specifies that the two classes and one sub-class defined in Paragraph 5 of the amended complaint of the Plaintiffs' intervention--

JUDGE RUBIN:

That order was dated, so that the record may be complete, June 28, 1973, and it both determined that this was a proper class action, defined the classes, and permitted the amended complaint to be filed and the intervention to be filed.

MR. STRICTLER:

That order, Your Honor, was also submitted to the counsel for Defendant and they approved it before I ever submitted it to the Court.

JUDGE RUBIN:

Mr. Danner, have you had a chance to check the stipulation to see if there was anything in the stipulation you do not agree with?

MR. DANNER:

Your Honor, I cannot find my copy.

JUDGE RUBIN:

Here is one you might look at if you like.

(Document to Mr. Danner after which time, the following proceedings are had:)

MR. DANNER:

Well, so far as any opposition to the stipulation, I do not have any per se.

JUDGE RUBIN:

As I understand it, really then what we might say is that, although the Court has defined the class, you

request a re-definition as rule 23 does permit.

MR. DANNER:

That's correct.

JUDGE RUBIN:

It permits the Court at any time, having defined the class, later to change its mind and re-define it; is that correct?

MR. DANNER:

That's correct.

JUDGE WISDOM:

You may proceed with your argument.

MS. GINGSBERG:

If I might just preliminarily say something about this class status. There is a case very closely in point, Johnson Against Rockerfellow, 58 Fed. Rules Decision, 42, Southern District of New York, 1972, supplemented in 1973.

JUDGE WISDOM:

What is the page number?

MS. GINGSBERG:

42, 58 Fed. Rules Decision, 42.

In a pre-trial decision in that case, it was a case attempting to invalidate New York's Civil Debt Law, and the class consisted of all persons in New York prisons who then had or might in the future have a

cause of action that they wished to pursue.

An argument was made that some prisoners might prefer to wait until they get out of prison and, therefore, were not proper -- properly represented in the class action.

The judge said that that issue was one that went to the merits of the claim of a denial of equal protection and not to the propriety of class action status. Obviously they never -- no selected declaration of unconstitutionality. If the law is unconstitutional, it is inevitably unconstitutional as to all members of the class.

I would like to address first the issues of Plaintiffs' standing to sue and then the merits of Plaintiffs' claim.

This is an action to challenge the mandatory exemption of women from jury service under Louisiana Law.

Outstanding generally it is Plaintiffs' position that they and the classes they represent are subjected, to their detriment, to dissimilar treatment solely on the basis of their sex, and that this dissimilar treatment violates the 14th amendment guarantee of equal protection safeguarded to all persons, male and female, alike.

The test for standing in a controversy of this kind,

according to the controlling Supreme Court precedent, is two-fold:

First, the interests sought to be litigated must arguably fall within the zone protected by the constitutional guarantee invoked.

And, second, Plaintiffs must allege that the legislation has -- has caused or will be caused or will cause them injury in fact, injury that need not be economic.

Unquestionably the interest asserted by Plaintiffs here fall within the zone protected by the 14th amendment equal protection guarantee. Dissimilar treatment of men and women has been declared unconstitutional.

JUDGE WISDOM:

Ms. Gingsberg, do you perceive any difference in the criteria in standing to sue whether the action be based on equal protection or due process?

MS. GINGSBERG:

No, I don't think that there is a difference in determining the question of whether the litigance can present that claim.

JUDGE WISDOM:

Other than the first half, I think the first half of it does present some sort of classification question,

that is whether there is an arguable protection.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Taken as a whole, there you would draw no distinction between whether the claim is due process or equal protection?

MS. GINGSBERG:

I do not, and I don't think the Supreme Court has.

JUDGE WISDOM:

It seems to me the Supreme Court has drawn such a distinction. A claim under the equal protection clause must show prejudice or damage to the individual.

I am not so sure that the Supreme Court has required a showing of injury to the individual under the due process clause.

MS. GINGSBERG:

Well, we --

JUDGE WISDOM:

Now, I am not saying that what I have just said is not directed to the definition of the class but directed--

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

-- directed to the question of standing.

MS. GINGSBERG:

On the question of damage or prejudice to the individual, the forming of injury in fact goes through many of the Supreme Court decisions on standing.

I think that all three classes of Plaintiffs here in fact satisfy that standard.

JUDGE WISDOM:

Your contention is that there was injury to the Plaintiffs here?

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Well, whether it was under the equal -- and regardless of equal protection or due process.

What was the injury to the women as a class?

MS. GINGSBERG:

We must separate the two classes of women.

First, the more -- the larger class, that is women as potential jurors. The provisions challenged here specify that to be eligible for jury service, women must submit to a registration requirement that is not imposed on similarly situated men. The plaintiffs contend that this registration requirement causes them injury in fact by setting them

apart as subordinate citizens. The challenged provisions in effect describe two classes of adult citizens who meet the objective qualifications for the jury service.

The first class are those fully responsible for lay participation in the administration of justice, a category composed exclusively of men.

And the second, those whose participation is deemed subordinate to their responsibility at home, and this class is composed exclusively of women, including single and childless women.

Jury service, even more than the vote is at the same time a citizen's right and responsibility, a form of participation in the processes of government, an essential accoutrement of the right of litigance to an impartial jury drawn from all segments of the community, therefore, a responsibility.

JUDGE WISDOM:

Now, you are pitching your case thus far entirely on the dissimilar treatment of women.

You are not pitching it, for example, on any issue in which the public as a whole might be interested, such as the integrity of the jury system, which requires as a predicate a cross-section of the community for composition of the jury.

Do I understand you correctly?

MS. GINGSBERG:

I think that is not an accurate characterization of this claim.

Plaintiffs say, of course, standing -- we are injured in our own right, but we also raise a concern that affects the larger community, and for that reason it is all the more compelling to recognize the standing of these plaintiffs. They say they are immediately injured by being set apart as a special class that doesn't really fully -- is not expected fully to fully participate in community affairs, but the result of that, consequence of that impacts adversely on the community because it makes juries less representative. And certainly that claim comes out in connection with the woman who represent litigance or potential litigance.

But the point is, in this dual right and responsibility, so far as the right is concerned, a woman's access to the right is conditioned on a registration requirement which she may never learn about, may never know she has to exercise.

And a man's opportunity for that right, if you consider it a right, doesn't depend upon his information or misinformation.

More important, though, if we look on the obligation side of it, a woman's exemption from the obligation to serve without any reason other than her status as a woman injures women as a class by typing all its members as persons not really needed for lay participation in the administration of justice.

JUDGE RUBIN:

I think what we would like to do is focus on the large class rather than the intervenor class.

How, under the test in the Sierra case --

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

-- how do you find the injury in fact here?

MS. GINGSBERG:

The Supreme Court has enlightened us since the Sierra Case. Its most recent outstanding pronouncement being, with respect to all classes in this case, should be dispositive. The case is United States against Scrap, 41 U.S. Law Week, 4866, decided on June 18, 1973, after the briefs in this case were submitted.

The Court in Scrap said first that standing is not to be denied simply because many people suffer the same injury. In that case the injury was harm to

aesthetic and environmental well being.

And then the Court went on to quote with approval the formulation of standing expounded by Professor Davis, and the Court quoted these words:

"The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle. A fraction of a vote, for example, a dollar for the home tax for another. The trifle is the basis for standing, and the principle supplies the motivation."

JUDGE RUBIN:

I don't understand that you are answering my question, although perhaps you are.

Are you saying that the Sierra test is no longer used and the Scrap test antidates it, or are you saying that both under Sierra and Scrap a trifle will suffice?

MS. GINGSBERG:

I am saying that Sierra -- Scrap supplied the trifle that was absent in the Sierra Case.

JUDGE RUBIN:

What is the trifle here?

MS. GINGSBERG:

I would consider it much more than a trifle, and that --

JUDGE RUBIN:

I am going by the language you have suggested on me. It's not my language.

MS. GINGSBERG:

Well, we certainly meet that standard, but I think we would be of a more stringent standard.

The point is, look at these laws, and they say to women, well, now, you can serve if you want to, but we really don't need you to run this system.

They would not automatically exempt the men because we want them here, and it gives a message to women and it comes across loud and clear that they are subordinate so far as participation in any community affairs is concerned.

JUDGE WISDOM:

May I interrupt, and I hope you still bear in mind Judge Rubin's question.

I get the -- I draw the inference that you are primarily concerned here with the fact that women are treated dissimilarly and, therefore, placed in a subordinate position.

I am looking at it more broadly and ask, for example, whether as a member of the national community the damage is to the jury system and would you have standing as a member of the national community, whether a man or woman, to challenge this system

because it's destructive of the integrity of the Jury as representative of a cross-section of the community?

MS. GINGSBERG:

You are asking the question whether any person --

JUDGE WISDOM:

Any person.

MS. GINGSBERG:

-- a citizen would have --

JUDGE WISDOM:

Any citizen.

MS. GINGSBERG:

-- would have standing?

I think that that is a question that need not be answered in this case because we come to the group that is itself marked with this badge of second-class citizenship because they are not included.

JUDGE WISDOM:

Well, then, does that limit this class then to the treatment of women as opposed to the treatment of men?

MS. GINGSBERG:

No, certainly not.

We have a class of men who seek a certain standing on other ground beyond that.

The final thing that the Court noted in the Scrap Case is that where the community will allegedly benefit from the adjudication --

JUDGE WISDOM:

I am afraid I diverted you.

Going to Judge Rubin's question, which was, what is the injury, rather than trifle, what is the injury in the case that was absent in the Sierra Club present here?

MS. GINGSBERG:

The injury here is that women are told by this system that you are secondary participants in the community, and like it or not we regard you as persons who are first responsible at home, and then if you want to, but you really dont have to, you can serve on a jury.

JUDGE WISDOM:

Could that be treated as sort of a benign or benevolent attitude rather than an intentional injury?

MS. GINGSBERG:

As a benign classification, well, now, we are going over from standing to the merits, and I would say that like maybe ninety-nine out of a hundred classifications that were once thought designed to protect or privileg women, this one has been

recognized for what it is.

I think Justice Douglas put it best in his concurring in opinion in Alexander against Louisiana. He said quite simply this kind of a system portrays a view of woman's role that cannot stand scrutiny under today's standards. As a class not capable of shouldering the same civic responsibility as men, and to put it more bluntly, it reflects the historical --

JUDGE WISDOM:

Was that an equal opportunity case?

MS. GINGSBERG:

Alexander against Louisiana?

JUDGE WISDOM:

Yes.

MS. GINGSBERG:

No, that was a case in which the provisions we are discussing here --

JUDGE WISDOM:

Equal employment?

MS. GINGSBERG:

It was a challenge to the Louisiana jury selection system on several grounds. One on race discrimination and on sex. And I think the distinguishing issue in that case is that the Court, the majority,

decided that the selection of the Grand Jury was defective by racial discrimination and, therefore, said they did not have to go on and consider the further question of state -- of sex discrimination. That was simply the Court's usual position, customary position of not reaching out for a constitutional question that was not necessary to the decision of the case. But Justice Douglas in a concurring opinion did treat the issue of sex discrimination, precisely the issue that's before this court.

JUDGE RUBIN:

Let me put a different question to you if I may, Ms. Gingsberg.

Suppose the Court were convinced that whatever be the standing to sue of the Plaintiffs' class, the intervenor class has standing to sue, is there any difficulty then in that class of challenging the provisions with respect to criminal juries, which are different than those with respect to civil juries since they all assert civil litigation?

MS. GINGSBERG:

Yes, our plaintiffs assert civil litigation, I think, for obvious reasons. There is a problem in coming to Federal Court when a person is involved in a

State criminal process, there may be a problem when civil litigation is going because of a strong policy of not interfering with the State judicial proceedings. That was a point that was recently made.

JUDGE RUBIN:

Certainly, there are some women that have been convicted and, therefore, don't have the problem of interference --

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

-- if that were the question.

That doesn't answer the question, does it?

MS. GINGSBERG:

But it goes -- it goes much beyond the woman who is convicted.

This complex of statutes right now tells every woman in the State that you aren't in effect something less than a full adult citizen. We treat you to some extent as a child. We are protecting you against a basic civic responsibility.

JUDGE RUBIN:

Well, maybe you don't want to answer the question.

If you don't understand it, I will put it again.

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

My question is, suppose the courts for some reason didn't accept that argument and said, clearly the women intervenors as a class have standing to sue. They are involved in litigation and they can have their financial interests adversely affected by not having a jury that is a fair cross-section of the populous, they are all women who are engaged in civil litigation, do we then have standing on the part of these women as litigants to attack the statutes dealing with criminal litigation?

MS. GINGSBERG:

I certainly think so.

It isn't necessary, of course, for you to decide that all three classes have standing in order to reach the merits.

It's sufficient for you to decide that one such class has standing.

In brief we refer to the few empirical studies made in the area. It shows male juries award more to males than to female jurors in personal injury claims.

And I think if we look at it in another way, if the shoe

were on the other foot, suppose Louisiana had a system in which all men were excluded from jury service except those who volunteered or blacks or blue collar workers, would there be any doubt, based on a such a system, a litigant's potential litigation, a man, a black, a blue collar worker, could legitimately object to the mandatory exemption? It works a virtual exclusion.

JUDGE RUBIN:

If that's rhetorical, I don't find it rhetorical, I don't find it self-answering.

In those cases where we have successful jury challenges, it has usually been by a defendant or by someone who can demonstrate adversity of result like a litigant.

You answered my question that assumed standing on the part of civil litigance with a civil analogy, jury verdicts.

MS.GINGSBERG:

Yes.

JUDGE RUBIN:

My question is, suppose the Court would say that there is standing to sue with respect to the attack on the civil jury proceedings, why does this give them standing to sue with respect to criminal jury

proceedings?

That's all right, I don't want to persist.

MS. GINGSBERG:

This class is designed as -- I don't think the representatives are civil litigants, I don't think the class in that manner, the class, I think, is designed -- designed as a present or potential litigant, I don't think that the complaint describes them as civil litigants.

So our main representatives are civil litigants, but I think they are -- appropriately represent litigants whether plaintiffs or defendants, whether civil or criminal proceeding.

JUDGE WISDOM:

I notice that in Justice Douglas' opinion he puts it squarely on the subject, squarely on the basis of due process, lack of a fairly selected jury. But, of course, the defendant in that case, Alexander, was a defendant who had been convicted.

MS. GINGSBERG:

Yes.

It's a different procedural posture. It was a male defendant objecting to the absence of women on the jury.

JUDGE WISDOM:

Nevertheless, he was a party -- he was a defendant and entitled to a fairly chosen jury.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Your broad class doesn't have anybody like that, so you are driven, I guess, to equal protection.

MS. GINGSBERG:

That's correct.

Our male class are men who are claiming that they are exposed excessively to the burden of jury service.

We do not have a class of male litigants. We do not have a named plaintiff in the position of Alexander.

And, quite frankly, our principal thesis in the case is the denial of equal protection both for men and women.

JUDGE WISDOM:

If you are necessarily driven to that, I won't say driven, that must necessarily be your position with respect to that broad class of all women.

MS. GINGSBERG:

Yes. Yes, it is.

And I would not describe it as a position to which -- to which we were driven.

JUDGE WISDOM:

Well, I wouldn't say driven. I withdraw driven if you object to the word.

MS. GINGSBERG:

Well, on the standing then on the sub-class of the women who were currently parties or who will be parties --

JUDGE WISDOM:

Are we expected to take judicial notice of the class, that is, put you in a subordinate position, put women in a subordinate position?

Perhaps the women in let's say, wherever it was, I have forgotten, Tangipahoa --

JUDGE RUBIN:

St. Tammany.

JUDGE WISDOM:

St. Tammany, that perhaps a majority of women prefer not to serve on juries.

MS. GINGSBERG:

I think it's true that any group given an exemption for the asking would prefer not to serve.

JUDGE WISDOM:

Take, for example, the manual laborer who is exempted, has been exempted as a group, and yet the Court has held that that's improper.

MS. GINGSBERG:

Yes.

But I think that that issue of whether people really went to qualify has come up in a number of causes of action in a number of groups. I think it is no more acceptable here.

JUDGE WISDOM:

Yes. In every case it has been by a litigant.

Your plaintiffs are not litigants and you are saying that you know really what's best for them.

MS. GINGSBERG:

Not precisely.

The original suit in the case of Lipwig against Krook was, I believe, not on behalf of any litigant but on behalf of women who wish to serve on juries.

More recently, very recently, there was a decision in the middle district of Alabama, Pendergast against Eubanks, and that followed the same pattern, a class of women who wish to serve on juries.

JUDGE WISDOM:

It isn't much of a hardship to register with the clerk for those who desire to serve on juries.

MS. GINGSBERG:

It may not be much of a hardship to register, but the requirement in itself sets apart women as a class, and when we are looking on the obligation side of

this, which is particularly important for women as litigants, I think we can say that any group given the opportunity to avoid jury service would probably not flock to the courthouse to register to serve.

The standing of the male plaintiff in this case, I might point out, by the way, the defendants in their motion to dismiss and also in their formulation of the issues, do not raise any standing challenge to eitherthe class or the sub-class of female litigants who raise an equal protection objection.

Defendants do challenge, however, the standing of the male plaintiffs in that regard. And, again, I think, it is clear that under the most recent Supreme Court decisions, the male plaintiffs have alleged injury. In fact, they assert that the current arrangement subjects them to a disproportionate obligation to serve even if they have a few year hiatus because of the female exemption, whatever relief they are given, they are still carrying a double burden, and this unequal proportion of the jury causes them to lose work them and dollars and other expenditures.

JUDGE WISDOM:

Now, you do represent some plaintiffs who are litigants?

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

Do we have to reach any question except that, do we have to do any more than recognize their standing to sue and then go to the merits?

MS. GINGSBERG:

With the exception of the question raised by Judge Rubin, who -- certainly, our named plaintiffs are civil litigants, but I think we have described the case as present and potential litigants without qualifying that.

JUDGE RUBIN:

They couldonly be unwilling litigants in any other matter, because in any other matter the litigant, that is the one who invokes the suit would be the--

MS. GINGSBERG:

Yes.

JUDGE RUBIN:

-- but that's all right.

MS. GINGSBERG:

I think my answer to that is that it is not necessary for you to make a finding that each of these three classes has, depending -- it's sufficient one

of them has standing to raise the issue on the merits.

JUDGE RUBIN:

I put one more question to you, and I guess Mr. Danner had best pay particular notice to this one. I think I really know what your answer would be, but would the Court be justified in assuming that the class of plaintiffs, the general class of plaintiffs embraces at least some women who are inevitably going to be defendants in criminal cases?

MS. GINGSBERG:

Yes, because the general class embraces all women in the State of Louisiana who meet the objective qualifications for jury service but who have not registered for such service. Inevitably, there will be some of those who will become defendants in criminal cases.

If I could just conclude on the standing issue.

Our position is that for each class of plaintiffs, there is a good deal more than an identifiable trifle at stake. The principle here is that equal citizenship rights and responsibilities for men and women supplies ample motive for a vigorous contest.

We are not asking this court to decide any kind of

meta abstract or ill-defined issue. The named plaintiffs represent distinct groups, each significantly affected by the challenged provisions, and their claim present a clearly focused controversy in an adversary context.

I would like to turn then to the issue on the merits.

JUDGE WISDOM:

I think we can save some time here, and the Court is in complete agreement in this, and that is that we think we understand the issues on the mertis and we were more concerned about the questions of standing.

So I dont think you really need to say anything on the merits, but if you feel you've got something in your system and you just must get it out, you may say a few words.

MS. GINGSBERG:

No, no, if the Court has no problems on the merits, I don't feel that there is anything I must get out.

I was just reviewing to see if there was something outstanding I have not said.

JUDGE WISDOM:

Well, on rebuttal, we will give you a few minutes on rebuttal if you should need it.

MS. GINGSBERG:

All right.

JUDGE WISDOM:

We will hear now from Mr. Danner.

MR. DANNER:

Yes, sir, Your Honor.

I have three points I would like to make:

First of all, in the case of Water Case, 82 Supreme Court, 159,1961, the Supreme Court of the United States held the Florida statute similar to the Louisiana statute providing an exemption for women to be constitutional. The Court held that the Florida statute granted to women the privilege to serve but did not impose such a duty. They held the Florida statute to be constitutional because the basis for the statute said women are the center of the family unit despite the economic changes at the time, and I think that theory will apply today.

Secondly, the Louisiana Supreme Court has held our jury exemption statute to be constitutional at least ten times, as noted on Page 11 of our motion to dismiss.

Further, in the case of Alexander versus Louisiana, as mentioned before, the Supreme Court of the United States had the issue of the constitutionality of

the Louisiana jury exemption statute before it but decided not to rule on the constitutionality of that statute.

So far as the case of Carter versus Jury Commissioners, 396 United States, 320, 1969, that particular case unequivocably doesn't apply to the case at bar mainly because in that case the defendants excluded the plaintiffs from the jury list.

In our situation here, we do not have a blatant exclusion.. We have an exemption which was granted.

I have nothing further.

JUDGE RUBIN:

How would you answer, Mr. Danner, the question that I put to Ms. Gingsberg that I noted particularly for your attention with respect to standing to sue, and that is, if the class is composed of all women in the state, it inevitably includes some women who will be charged with crimes and some women who will be involved in civil litigation and, therefore, on behalf of at least these women the plaintiffs have standing?

MR. DANNER:

If the class included all women, I would say, yes, if that's the class, which in my opinion —

JUDGE RUBIN:

Hitherto it is unless we modify it, isn't that the one we found previously? Isn't that the way the class is now defined unless the Court changes it, all women?

MR. DANNER:

I believe that's right.

JUDGE RUBIN:

Is it justifiable for a class to litigate saying, we don't know on which of us this burden will fall but it assuredly will fall on some of us, therefore, before it falls we assert our interest in this determination. Is that a proper assertion of standing to sue?

MR. DANNER:

No, it's not, Your Honor.

I think in that instance the class could not help but represent those in fact that should be represented.

JUDGE WISDOM:

Would you concede that a litigant has standing?

MR. DANNER:

In regard to the --

JUDGE WISDOM:

Let us say a person who is in a suit either as a plaintiff or defendant in which there is to be a jury trial, does such a person have standing?

There are such plaintiffs here.

MR. DANNER:

That's correct.

I don't think so, Your Honor.

JUDGE WISDOM:

You don't think such a person would have standing?

MR. DANNER:

No.

JUDGE WISDOM:

Well, then, let me put it to you this way.

It's fundamental and has been since Trouter versus West Virginia that a jury must represent a cross-section of a community.

Very recently, last, not this June but the previous June, the Supreme Court held in Peters against Kitf that a white man had standing to challenge the Jury system on the ground of the systematic exclusion of blacks from the jury system. That was on the theory that the jury system, there was a lack of due process in that he was entitled to a fair trial, and a fair trial rests or comprehended a jury chosen from a cross-section of the community.

Now that such a person is in the position, let us say, of a man or woman who would object here to the exclusion of a large segment of the community, it

is an exclusion in fact whether you may not call it an exclusion, because the requirement is such that there is no incentive to women to register or to volunteer, and they don't volunteer, as proved by the stipulation, that less than, oh, I think two or three a term volunteered in St. Tammany. So it is factually bolstered, too, that a segment, a large segment of the community is excluded.

MR. DANNER:

In that regard, Your Honor, I think relative to due process laws, I think it would apply to a defendant in a criminal case.

JUDGE WISDOM:

Well, you are entitled to due process in a civil case, too.

But what -- I am not -- I do not mean to say there is no merit tothe equal protection argument.

It seems to me very clearly there is merit to the due process argument on the merits if there is standing to sue, and there is standing to sue if the plaintiffs, one of the plaintiffs, is a litigant.

MR. DANNER:

Well, to my knowledge, Your Honor, I don't -- I haven't heard or read a case which dealt with that particular problem.

JUDGE WISDOM:

I know you have read cases holding that segment of a community cannot be excluded even with the most benevolent motives, for example, wage earners. Wage earners. The legislature excluded wage earners because the legislature felt they should not have to sacrifice, they were not in a position to serve on juries and leave their work. That's a benign motive, but it's a large segment of the community and it cannot be excluded.

Women, as you just argued, hold the family together according to the views of some male chauvinists and, therefore, they are excluded.

It is an exclusion in fact, even though it's not couched in terms of exclusion.

MR. DANNER:

Like I mentioned earlier relative to criminal prosecution, yes, I know of authority that holds in litigation --

JUDGE RUBIN:

Well, Frontiero, which I don't think you have dealt with adequately, deals with the interest of a class of women on a civil matter, and doesn't it indicate a different criterian that the one applied in Hoit with respect to what kind of

classification may validly be drawn in civil matters?

MR. DANNER:

That's an inference to that.

JUDGE RUBIN:

With respect to what kind of a classification, I think really your argument on the merit rests fundamentally that Hoit was decided and we must follow it; isn't that correct?

MR. DANNER:

Basically, yes.

JUDGE RUBIN:

And I think there is a good deal to be said for that position if the test remained the same.

But the rationale of Hoit, as I read it, is that a certain kind of classification is justified, a classification in which there is a rational foundation or a reasonable classification. Those are the touch words.

Frontiero said, however, as I read the case, that in distinguishing between sexes there must be more than something merely a rational classification.

If that be so, isn't the foundation for Hoit gone?

MR. DANNER:

Logically --

JUDGE RUBIN:

Let me simplify it.

Do you read Frontiero as propounding a different test?

MR. DANNER:

I would think that the test in Frontiero would be more stringent, I would think.

JUDGE RUBIN:

Then don't we have to re-examine the question regardless of Hoit?

MR. DANNER:

Yes.

JUDGE RUBIN:

Now, Hoit, as I read it, is based on the notion that women, or to put it another way, woman is still regarded as the center of home and family life.

In some recent government statistics, I have seen something that indicates that about sixty percent of the women of the United States between the ages of twenty-one and sixty are gainfully employed outside the home.

Could we still rely upon such an assumption, that woman is still regarded as the center of home and family life?

MR. DANNER:

If you mean by the fact there are more women employed,

therefore, they are not still the center of the family unit, I would say yes.

If you think the mere fact that employment, increase in employment takes away their function as a member of the center of the family, I would say yes.

JUDGE RUBIN:

Well, it might leave woman as the center of the family except between the hours of nine to five if sixty percent of the women find it convenient to be absent doing whatever kind of job they do, they could equally do the job of a juror.

In fact, I frequently tell them if they can go and be a clerk in Maison Blanche, they can serve on the jury.

What I am saying is, didn't the Court in Hoit really base their assumption on an economic notion to which they accorded judicial notice that is no longer viable?

MR. DAMMER:

Your Honor, if I remember correctly, the Court did consider the fact that women in 1961, at least the employment range at that time talking about women at that time in 1961 had increased. I believe the language, I can't quote the exact language, but the Court did take cognizance of the fact that al-

though women were participating more in the economy that -- that it was the opinion felt by the Court that woman was still the center of the family. I don't think they disregarded the fact that there were more women working today than in 1961.

JUDGE WISDOM:

I would like to suggest this to you, the Supreme Court already expressed itself and expressed itself thirty years ago that the exclusion of women from jury panel was irrational, and the Court said the jury was not limited -- that was Ballard against Ballard, or it was a case decided under the Supreme Court's supervisory power, but it certainly is an expression then of the Court's view of the rationality of the exclusion of women. And the Court said the jury is not limited to the defendant. There is injury to the jury system, to the laws and institutions, to the community at large and democratic ideal reflected in the processes of our courts. And it seems to me this is a clear expression of the Supreme Courts' view of what is rational and what is irrational and was not overturned by Hoit.

And my real problem is with the question of standing, because I think there is standing with regard to

women as a class.

I don't have much trouble when the standing can be recognized, as in the case of a party litigant. And I would like to hold that, I'd like to be able to overrule Sierra. I can't quite do that.

MS. GINGSBERG:

Sir --

JUDGE WISDOM:

Maybe I can distinguish it, but that's not for you, that's for Ms. Gingsberg.

JUDGE RUBIN:

Let me suggest to you really if you do want to file a supplemental brief on this, we will be glad to let you do it. But if we set side by side the text of Sierra and a text of Hoit, we really do have some difficulty in reconciling it.

In Hoit, the Court said, for example, one of the reasons the State can justify this system of asking women to volunteer for jury service and not asking men to do it, which amounts, of course, to a type of exclusion, is because of a determination -- I am reading from Page 164 of the Supreme Court Reporter-- because of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibility

of a prospective female juror were serious enough to warrant an exemption.

Now, turning to Frontier, reading from 41 Law Week 4613: any statutory scheme which draws a sharp line between the sexes solely for the purposes of achieving administrative convenience necessarily commands similar treatment for women. Therefore, arbitrary choice is forbidden by the constitution. So we have identical language with a reverse result.

And I think for the Court to accept your position on the merits, we would have to be shown some reason why that language in Frontiero doesn't in effect withdraw the basis for the classification made in Hoit.

If you want to wrestle with it in a supplemental brief, I think we will be glad to see it, but I think you have to wrestle directly where it is. I don't think you can sidestep it.

MR. DANNER:

If the Court so desires.

JUDGE RUBIN:

If you think you have more to say, we don't want you to file more paper just for the sake of using up some of that scarce commodity.

JUDGE WISDOM:

Do you have anything further?

MR. DANNER:

No, Your Honor.

JUDGE WEST:

I would just like Ms. Gingsberg to comment on Hoit, if you would, please.

MR. DANNER:

Thank you.

MS. GINGSBERG:

The Hoit decision did uphold a statute very similar to this one in 1961.

Florida appealed that law in 1967.

Louisiana is the only state in the union left with such a law, but, of course, the measuring line used by the Supreme Court in 1961 in Hoit is a very different standard than the one that they use today, not only in Frontiero but perceptive readings, reading as we saw that that was coming at the time of Hoit, there was an unbroken line of precedent in the Supreme Court starting from the 1860s, the legislature could draw a sharp line between sexes and the Court was not going to do anything about that. Cross generalities were permitted.

But in 1971, we had Reed against Reed, and in 1972,

Stanley against Illinois, the unwed father who claimed a right to parenthood of his children, there was a right to unwed mothers only. So it's not simply equality for women, it's a two-way street here. Reed was first, Stanley against Illinois was next.

Of course, many lower court decisions back this up. And then finally, and most spectacularly Frontiero against Richardson, that's a case that made it clear that unequal treatment wouldn't be tolerated, and the statute there was based on the very same kind that's involved -- well, most women stay home so we will automatically get the many service benefits for their wives, assumed to be interested, but most men work to service women. The same kind of dichotomy, the same way in looking at the words in Frontiero. And more than that, at the time of Hoit, the Court was able to say there are many other states that brought in -- or similar distinctions classify those standards that they refused to in an earlier case, Fay against New York. Many, many cases at that time had a similar pattern. Frontiero against Richardson, dealing with a statutory pattern that was pervasive. Still it runs through hundreds of federal state

laws, and that was no secret to the Supreme Court because the solicitor general made that very plain, and yet they struck down that differential. In any event, the counts on Hoit would work the other-- those counts would work the other way. Louisiana is the only state left with such a statute.

JUDGE WEST:

Thank you.

MS. GINGSBERG:

If I may just make a footnote to the Sierra Club decision. I think that it has been substantially elaborated or qualified, depending on how you would like to classify it, by United States against Scrap. Sierra Club is the only group inside, that the members of your club are using their facility, you would have made it, you would have had standing, but coming to us with an abstract question not alleging any abuse by your -- any injuries by your members and just expecting us to --

JUDGE RUBIN:

Mr. Justice Brennan said that in a concurring opinion, I suggest they go back and amend and simply say that.

MS. GINGSBERG:

The Scrap Case was one student group, environmental

defense fund, the two plaintiffs, just that little more in the case, not very much more, it was heavy weighted, but it was enough. The Court said, I wanted to --

JUDGE WISDOM:

Let me ask you this.

In the language of Frontiero, which refers to it as invidious, the classification as invidious, does that mean that we say there is a presumption of injury as there is we will say in a case where there is racial discrimination?

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

In other words, we would not use the rationale test but would have to use compelling State interests tests?

MS. GINGSBERG:

Yes.

I think it's plain, even after Reed, a number of courts recognize no longer any minimal rationale comparable to sex classifications.

The Second and Fourth Circuits had come out with midway tests, say something more than rational and -- I can't distinguish the two words --

JUDGE WISDOM:

It may really be a question of playing with words there, but the effect is different.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

If we can presume injury, for example --

MS. GINGSBERG:

It's very clear in Justice Brennan's opinion he would treat a sex classification as he would treat a classification based on national origin. The burden is on the proponent to justify it.

Incidentally, I was technically incorrect, it does not include all women. Our class is all women in the Twenty-Second Judicial District. And, as Mr. Strictler has pointed out, the jury selection is the same for criminal and civil juries. So it is that selection system we are challenging here.

On the comment that Judge Wisdom made, that's a very revealing unit against Ballard.

JUDGE WISDOM:

Yes.

MS. GINGSBERG:

This is very enlightening referring to Ballard.

JUDGE WISDOM:

I saw that, I saw that I was making the same point

as I made, that it was decided under the Supreme Courts' supervisory power.

MS. GINGSBERG:

Yes.

JUDGE WISDOM:

But it still strikes me as evidence of the fact that the Supreme Court then regarded it as irrational, otherwise it would not have set it aside under the-- it would not have said what it did under the supervisory power.

MS. GINGSBERG:

Yes.

And on the question of trying to show any kind of a military convenience in the case, it would seem to me an almost impossible chore. Federal courts now have been sitting with juries composed of approximately fifty percent women and there has been no report of delay or inconvenience because they can serve on the same basis as men. I think the showing here would be far more difficult than it might have been in Frontiero had they attempted it.

JUDGE RUBIN:

I had a jury recently, Ms. Gingsberg, composed of five women of various educational attainment, all white,

and one black male truck driver. When they deliberated, who do you think was elected foreman of the jury?

MS. GINGSBERG:

I think I know.

That will take time.

JUDGE WISDOM:

Mr. Danner, do you wish to submit a supplemental brief?

MR. DANNER:

Yes, Your Honor.

JUDGE WISDOM:

How much time would you need?

MR. DANNER:

Not more than about a week.

JUDGE WISDOM:

Well, suppose we give you a week to submit a supplemental brief and then serve a copy on your opposing counsel.

And I assume you will not really require a week, nobody is taken by surprise here.

MS. GINGSBERG:

No.

JUDGE WISDOM:

Well, get in your reply brief or supplemental brief or either contemperaneously with his or after you have

a look at his within a day or two.

JUDGE RUBIN:

I think before we close this, as what might be called the originating judge, I do want to express appreciation to counsel who have been cooperative in shaping up the issues and briefing them so the Court could consider the matters expeditiously and for the stipulation which is very comprehensive and permitted a thorough airing of the issues.

JUDGE WISDOM:

I associate myself with those remarks.

JUDGE WEST:

I agree, also.

JUDGE WISDOM:

The Court is adjourned under its usual orders.

(Whereupon, Court adjourned.)

REPORTER'S CERTIFICATE

I, GARY DAVIS, hereby certify that the foregoing is a true and correct transcription of my stenograph notes taken in the Courtroom, 400 Royal Street, New Orleans, Louisiana, on July 6, 1973, before the HON. ALVIN B. RUBIN, HON. JOHN MINOR WISDOM and HON. GORDON WEST, Judges Presiding.

GARY DAVIS
Official Court Reporter

Supreme Court, U. S.
FILED
NOV 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

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IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

Statement

This is a direct appeal from a judgment of a three-judge district court "declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional" and enjoining defendants "from enforcing the constitutional and statutory provisions declared to be unconstitutional." Amended Judgment, September 7, 1973, re-

produced in the Appendix to the Jurisdictional Statement at 28.

On June 25, 1973, preliminary to a pre-trial conference, the parties entered into a stipulation of facts.[1] A copy of this stipulation is attached hereto as Appendix A. On the basis of the stipulation, and without objection by defendants, the court declared by pre-trial order entered June 25, 1973:

> Issues of Fact
>
> There are no contested issues of fact. The parties have entered into a stipulation of facts for submission to the Court.

The stipulation recites that "[f]ifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and Washington Parish [the two parishes in which plaintiffs in this litigation reside] is female," that in St. Tammany Parish "no more than ten percent (10%) of the persons in the general venire or jury wheel are female," and that in Washington Parish, to the knowledge of the Clerk of Court, "no more than two women . . . have [ever] requested that they be made eligible for jury service" and "only on one occasion has a woman been included in a petit jury venire." Further, the stipulation includes a list of fourteen jury drawings made in St. Tammany Parish in recent years. In five of the drawings, no

[1] The representation in the Jurisdictional Statement at 5 that "[t]he only reference to the alleged facts of the case is contained in the complaint" is thus wholly erroneous. The stipulation provided the facts that constituted the basis for adjudication. "No testimony was adduced," because the court found, and the parties agreed, that there were no contested issues of fact.

women were drawn, in two, women represented .05% of the names drawn, in four, 1%, in two, 2%, and in one, where the representation of women was highest, 4%.

Also stipulated were the facts that plaintiff-intervenor Jenny Lee Smith Baggett "has filed a civil damage action . . . in Washington Parish and has requested a jury trial" and that plaintiff-intervenor Shirley Ann Robinson "is preparing to file a civil damage action in St. Tammany Parish [and] will request a jury trial."

ARGUMENT

In *Hoyt* v. *Florida*, 368 U.S. 57 (1961), this Court upheld the constitutionality of a Florida statute almost identical to the Louisiana provisions declared unconstitutional by the court below. On the basis of the stipulation of facts, demonstrating that under the Louisiana Jury Selection System, service by women is virtually non-existent, and following the direction implicit in this Court's decisions in *Reed* v. *Reed*, 404 U.S. 71 (1971), *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), *Peters* v. *Kiff*, 407 U.S. 493 (1972), and *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), the district court concluded that *Hoyt's* death knell has been sounded.

Hoyt represents the last occasion when this Court tolerated a legislative judgment based on gross generalizations concerning woman's place in man's world. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 718-21 (1971). ("At best, [*Hoyt*] overlooks the obvious fact that statutes exempting women from jury service do reflect the historical male prejudice against female participation

in activities outside the family circle.") Until *Reed* and *Frontiero, Hoyt* inspired extravagant description of the frivolity of women, *see, e.g., DeKosenko* v. *Brandt,* 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. N.Y. Co. 1970), and impeded recognition throughout the nation that jury service is at the same time a basic civil right and fundamental civic responsibility, to be shared equally by all adult members of the community.[2] Indeed, as illustrated by the decisions cited in Appendix B attached to this Motion and in the Jurisdictional Statement at 6, *Hoyt* continues to produce occasional knee-jerk responses from lower courts, both federal and state.

Appellees concur in Appellants' assertion that "the guiding hand of this Court is urgently needed." Jurisdictional Statement at 6. However, the decisional guidelines have been articulated in *Reed* and *Frontiero.* Explicit overruling of *Hoyt* is therefore appropriately accomplished without protracting this litigation and unnecessarily burdening this Court's docket.

[2] By 1970, however, Louisiana was the only state to retain "volunteers only" legislation on jury service by women; the majority of states treated women and men on the same basis. Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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December, 1973

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 73-688

Section "C"

MARSHA B. HEALY, *et al.*,

Plaintiffs,

versus

HON. EDWIN EDWARDS, *et al.*,

Defendants.

Stipulation of Facts

Plaintiffs, plaintiffs-intervenors, and all defendants in the above cause, through their respective counsel, do hereby stipulate and agree, subject to objection by any party as to relevance, competency and materiality, as follows:

1) The Jury Commissions of St. Tammany Parish and Washington Parish, whose members are defendants herein, comply with all provisions of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13, Article 3055 and Article 7, Section 41 of the Louisiana Constitution of 1921. Female residents of St. Tammany and Washington Parishes who are eligible for jury service under the standards of Article 401 of the

Louisiana Code of Criminal Procedure are not included in the general venires or jury wheels of the parishes unless they individually make written requests to their respective Jury Commissions to be so included.

2) Each of the female plaintiffs and female plaintiffs-intervenors is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041. None have filed requests to be placed in the general venires of their respective parishes and none have been so included.

3) Plaintiff-intervenor Baggett has filed a civil damage action in the Twenty-Second Judicial District Court in Washington Parish and has requested a jury trial. Plaintiff-intervenor Robinson is preparing to file a civil damage action in St. Tammany Parish. She will request a jury trial.

4) Each of the male plaintiffs is eligible for jury service under the standards of Article 401 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes, Title 13, Section 3041.

5) Fifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and in Washington Parish is female.

6) In St. Tammany Parish no more than ten percent (10%) of the persons in the general venire or jury wheel are female. In recent years the following jury drawings have been made:

November 22, 1971. Fifty (50) names for Grand Jury to serve first six months of 1972. Two (2) women drawn.

December 8, 1971. Two Hundred (200) names for jury term beginning January 10, 1972. One (1) woman drawn.

January 7, 1972. Two hundred (200) names for jury term beginning March 13, 1972. No women drawn.

February 28, 1972. One hundred (100) names for jury term beginning April 3, 1972. Two (2) women drawn.

February 28, 1972. Two hundred (200) names for jury term beginning April 13, 1972. One (1) woman drawn.

March 17, 1972. Two hundred (200) names for jury term of May 8, 1972. Two (2) women drawn.

April 11, 1972. Seventy-five (75) names for jury term of April 13, 1972. No women drawn.

May 22, 1972. One hundred-fifty (150) names for jury term of July 10, 1972. No women drawn.

June 15, 1972. Fifty (50) names for Grand Jury term for next six months. No women drawn.

July 26, 1972. Two hundred (200) names for jury term of September 11, 1972. Two (2) women drawn.

August 25, 1972. Two hundred (200) names for term of October 9, 1972. Two (2) women drawn.

September 28, 1972. Two hundred (200) names for jury term of November 13, 1972. Two (2) women drawn.

November 3, 1972. Seventy-five (75) names for jury term of December 18, 1972. No women drawn.

December 4, 1972. Fifty (50) names for Grand Jury term of next six months. One (1) woman drawn.

7) If called to testify, Dewaine Seal, the Clerk of Court of Washington Parish, would testify that to his knowledge, no more than two women in Washington Parish have requested that they be made eligible for jury service and that only on one occasion has a woman been included in a petit jury venire.

8) The discrepancies between the percentages of women in the populations of persons eligible for jury service in St. Tammany and Washington Parishes and the percentages of women actually included in the venires of those parishes is the result of the enforcement of Article 402 of the Louisiana Code of Criminal Procedure, Louisiana Revised Statutes, Title 13, Article 3055, and Article 7, Section 41 of the Louisiana Constitution of 1921.

GEORGE M. STRICKLER, JR.
Counsel for Plaintiffs and Plaintiffs-Intervenors

DALE C. WILKS
Counsel for Defendants

Dated: June 25, 1973

APPENDIX B

Hoyt-Inspired Judicial Tolerance of Sex-Role Stereotyping

All litigants are denied due process of law, and female litigants are additionally denied the equal protection of the laws by a jury service exemption for women "different from that available for men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service." So concluded the court below, despite the contrary precedent of this Court in *Hoyt* v. *Florida*, 368 U.S. 57 (1961).

Hoyt was the last of a series of decisions in which this Court exhibited extraordinary tolerance of gender lines drawn by the legislature.* A new direction was plainly marked in *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). With respect to jury service as a responsibility entrusted primarily to males, additional signposts of a change in judicial perspective appear in *Peters* v. *Kiff*, 407 U.S. 493, at 503-504 and n. 12 (1972), and *Alexander* v. *Louisiana*, 405 U.S. 625, 639-41 (1972) (concurring opinion). Reasoning that only the formal burial of *Hoyt* was awaited, the court below explained:

> When today's vibrant principle [which determined the outcome in *Reed* and *Frontiero*] is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding.

Other courts, both federal and state, have not perceived with similar clarity this Court's departure from the atti-

* Similar deference to legislative line drawing on the basis of sex was displayed thirteen years earlier in *Goesaert* v. *Cleary*, 335 U.S. 464 (1948).

tude reflected in *Hoyt*. Indeed, in 1973, the Louisiana Supreme Court concluded:

> There has been no contrary jurisprudence from the United States Supreme Court since the *Hoyt* case, although that Court has had the opportunity to overrule the case . . . .

(*State* v. *Enloe*, —— La. ——, 276 So. 2d 282, 284 (1973)) and a federal district court uncritically asserted on the basis of *Hoyt*, " . . . it is well settled that a state may allow women unconditional exemption from jury service." *Penn* v. *Eubanks*, 360 F. Supp. 699, at 703 (M.D. Ala. 1973). Nor are these expressions atypical. As the sampling below indicates, *Hoyt* contributes to perpetuation of conditions for lay participation in the administration of justice that are less than optimal, to persistence of the notion that exemption of women from adult responsibilities is a "benign dispensation," and to adherence to "outgrown dogma" that law-sanctioned restrictions premised on gender are presumptively valid. In short, unless and until this Court squarely overrules *Hoyt* and rejects the reasoning on which it is based, the quality of the *Reed-Frontiero* principle is likely to remain subject to divergent interpretation, "vibrant" to some jurists, of scant importance, signifying minimal change, to others.

[In the sampling below, the second page reference is to the portion of the opinion at which *Hoyt* is cited.]

> "It is manifestly unfair to indulge in generalities when speaking of women, which no one would think of using when referring to men." [1]

---

[1] Cottle, The Prejudice Against Women Lawyers: How Can it be Overcome? 21 Case & Com. 371 (1914).

Garner v. *Louisiana*, 368 U.S. 157, 195 (1961) (concurring opinion) (judiciary may take notice of well-known political and economic facts—in *Hoyt*, that woman is "the center of home and family life"). [In 1972, 60% of all married women living with their husbands were gainfully employed, and 42% of all working women were employed full-time the year round. U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment and Education (1973).]

Eslinger v. *Thomas*, 476 F.2d 225, 230 n.5 (4th Cir. 1973) (*Hoyt* signalled that arguments based on sex-discrimination would have scant chance of success).

Robinson v. *Board of Regents of Eastern Kentucky University*, 475 F.2d 707, 710 (6th Cir. 1973) (sex-based classifications are presumptively constitutional).

United States v. *Olson*, 473 F.2d 686, 687 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973) (whether Constitution prohibits exclusion of women from juries remains an open question).

Schattman v. *Texas Employment Commission*, 459 F.2d 32, 40 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (lump classification of women is permissible unless challenger proves it "arbitrary").

Baker v. *United States*, 401 F.2d 958, 964 n.14 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970) (jury service).

United States v. *Caci*, 401 F.2d 664, 671 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969) (jury service).

Gruenwald v. *Gardner*, 390 F.2d 591, 592 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) ("favored" treatment

may be accorded women solely on the basis of their sex).

Marshall v. *Holmes*, 42 U.S.L.W. 2206 (N.D. Fla. 1973) (jury service—*Hoyt* as precedent remains unscarred).

Eslinger v. *Thomas*, 340 F. Supp. 886, 896 n. 77 (D.S.C. 1972), *rev'd*, 476 F. 2d 225 (4th Cir. 1973) (sex discrimination has been held constitutionally tolerable).

Forbush v. *Wallace*, 341 F. Supp. 217, 222 n. 2 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972) (administrative convenience constitutes justification for sex-based differential).

Bastardo v. *Warren*, 332 F. Supp. 501, 503 n. 1 (W.D. Wis. 1971) (*Hoyt* classifies by sex for benign purpose).

United States ex rel. Epton v. *Nenna*, 318 F. Supp. 899, 903 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir. 1971), *cert. denied*, 404 U.S. 948 (1971) (jury service).

Leighton v. *Goodman*, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970) (jury service).

United States v. *York*, 281 F. Supp. 8, 13, 16 (D. Conn. 1968) (jury service).

United States v. *Valentine*, 288 F. Supp. 957, 966 (D.P.R. 1968) (nothing in the Constitution prohibits legislative limitation of jury service to males).

United States v. *American Oil Co.*, 249 F. Supp. 130, 136 (D.N.J. 1965) (jury service).

Williams v. *South Carolina*, 237 F. Supp. 360, 371 (E.D.S.C. 1965), *vacated*, 356 F.2d 432 (4th Cir. 1966) (jury service).

United States v. *Greenberg*, 200 F. Supp. 382, 392 (S.D.N.Y. 1961) (a fortiori, a jury selection system less restrictive than the one upheld in *Hoyt* is constitutionally permissible).

Bryson v. *State*, 211 So. 2d 246, 247 (Fla. 1968) (jury service).

Shevin v. *Kahn*, 273 So. 2d 72, 73 n.3 (Fla. 1973), *prob. juris. noted*, 42 U.S.L.W. 3246 (U.S. Oct. 23, 1973) (precedent supports sex-based classification).

Brewer v. *State*, 253 Ind. 154, 159, 252 N.E. 2d 429, 432 (1969) (although Indiana has not chosen to do so, state may constitutionally confine jury duty to males).

Holiday Inns of America v. *The Industrial Commission*, 48 Ill. 2d 529, 531, 271 N.E. 2d 884, 886 (1971) (presumptive validity of sex-based classifications).

Deems v. *Western Maryland Ry.*, 247 Md. 95, 103 n.2, 231 A.2d 514, 518 (1967) (precedent supports sex-based classification).

Commonwealth v. *McKay*, —— Mass. ——, ——, 294 N.E. 2d 213, 216 n.3 (1973) (jury service).

State v. *Hall*, 187 So. 2d 861, 867 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) (total exclusion of women from jury service is reasonable).

State v. *Parker*, 462 S.W. 2d 737, 739 (Mo. 1971); *State* v. *Davis*, 462 S.W. 2d 798, 800 (Mo. 1971); *State* v. *Wright*, 476 S.W. 2d 581, 586 (Mo. 1972) (*Hoyt* settles the issue—states may grant women absolute exemption from jury service).

State v. *Thomson*, 109 N.H. 205, 208, 247 A.2d 179, 181, *cert. denied*, 394 U.S. 903 (1968) (women need not bear civic responsibilities).

Shpritzer v. *Lang*, 32 Misc. 2d 693, 696, 224 N.Y.S. 2d 105, 109 (Sup. Ct. N.Y. Co.), *modified*, 17 A.D. 2d 285, 234 N.Y.S. 2d 285 (1962), *aff'd*, 13 N.Y. 2d 744, 241 N.Y.S.2d 869 (1963) (plain testimony of the senses, a well-known French proverb and precedent culminating in *Hoyt* support sex-based classification).

DeKosenko v. *Brandt*, 63 Misc. 2d 895, 897, 313 N.Y.S. 2d 827, 830 (Sup. Ct. N.Y. Co. 1970) (*Hoyt* is solidly based; women are to blame for their failure to serve).

Commonwealth v. *Daniels*, 210 Pa. Super. 156, 163, 232 A. 2d 247, 251 (1967), *rev'd*, 430 Pa. 642, 243 A.2d 400 (1968) (*Hoyt* counsels restrained review of sex-based classifications).

Archer v. *Mayes*, 213 Va. 633, 636, 194 S.E. 2d 707, 709 (1973) (*Hoyt* is controlling precedent—only one Supreme Court Justice has suggested *Hoyt* should no longer be followed).

Attorneys for appellees gratefully acknowledge the assistance provided in the preparation of this Appendix by Frank L. Politano, third year student at Columbia Law School.

Supreme Court, U. S.
FILED
APR 4 1974

No. 73-759

In the Supreme Court of the United States

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Appellants,

v.

MARSHA B. HEALY, ET AL.,

Appellees.

On Appeal From the United States District Court For the Eastern District of Louisiana

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No. 73-759

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Appellees.

On Appeal From the United States District Court For the Eastern District of Louisiana

---

Brief for Appellants

Opinion Below

The opinion of the three-judge United States District Court for the Eastern District of Louisiana is reported at 363 F. Supp. 1110.

Jurisdiction

Appellants filed a notice of appeal to this Court in the District Court on September 18, 1973. The Jurisdictional Statement was filed on November 12, 1973, and probable jurisdiction was noted on February 19, 1974. Jurisdiction on appeal is conferred by 28 U.S.C.A. § 1253.

Constitutional and Statutorial Provisions Involved

The three-judge court in the United States District Court, Eastern District of Louisiana, declared unconstitutional and enjoined the enforcement of Article 7, Section 41 of the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which are as follows:

(a) Article 7, Section 41 of the Constitution of Louisiana:

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

(b) LSA-R.S. 13:3055:

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

(c) Article 402 of the Louisiana Code of Criminal Procedure:

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Questions Presented

1. Did the three-judge court abuse its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)?

2. Do the Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve deny all of the male and female citizens of Louisiana due process and equal protection as sanctioned by the 14th Amendment of the United States Constitution?

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of Louisiana. Appellees claimed to be litigating on their own behalf and on behalf of others similarly situated. Named as defendants were all of the appellants.

The complaint sought declaratory and injunctive relief before a three-judge court.

The three-judge court rendered its opinion on August 31, 1973, declaring Article 7, Section 41 of

the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which provide an exemption of women from jury service, to be unconstitutional and enjoined appellants from enforcing these constitutional and statutorial provisions. Simultaneously the three-judge court overruled *Hoyt v. Florida*, 368 U.S. 57 (1961).

Following the opinion and order of the court below, appellants filed a motion to stay execution. The stay was granted by order of the court dated September 10, 1973. Thereafter, appellants filed their notice of appeal.

Appellants consist of the original defendants. Appellees consist of all those originally designated as parties plaintiffs and intervenors.

Argument

1. The Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve does not deny all of the male and female citizens of Louisiana due process and equal protection as sanctioned in the 14th Amendment of the United States Constitution.

One of the basic principles of constitutional law with regard to class legislation is that classifications and restrictions which serve to penalize or restrict the exercise of a constitutionally protected right are to be scrutinized closely and must be shown to promote a "compelling governmental interest" in order to withstand attack under the 14th Amendment. *See Shapiro*

v. Thompson, 394 U.S. 618 (1968); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Therefore, discrimination by sex is not patently unlawful or unconstitutional. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (Statute providing minimum wage for women but not men); *Rodice v. New York*, 264 U.S. 292 (1924) (special statute limiting hours of night work of women in cities with a particular population); *Goesaert v. Cleony*, 335 U.S. 454 (1948) (proscribing use of women as licensed bartenders); *Hoyt v. Florida*, 368 U.S. 57 (1961) (jury duty voluntary for women but compulsory for men); *Miskunas v. Union Carbide Corp.*, (7th Cir. 1968) 399 F.2d 847, *cert. denied*, 393 U.S. 1066 (1969) (denial to wife, but not husband, of right to recover for loss of consortium); *Gruenwald v. Gardner*, (2nd Cir. 1968) 390 F.2d 591, *cert. denied*, 393 U.S. 982 (1968) (women given more favorable treatment than men in Social Security benefits); *United States v. St. Clair*, (D.C. N.Y. 1968) 291 F. Supp. 122 (men subject, women not, under Selective Service Act); *Clarke v. Redker*, (D.C. Iowa 1966) 259 F. Supp. 117, (fixing wife's residence by husband's but not the reverse); *Heaton v. Bristol*, (Tex. Cir. 1958) 317 S.W.2d 86, *cert. denied*, 359 U.S. 230 (1959) and *Allred v. Heaton*, (Tex. Cir. 1960), 336 S.W.2d 251, *cert. denied*, 364 U.S. 517 (1960) (both involving denial of right of women to attend all-male state-supported college).

The rational basis and compelling state interest for exempting women from jury duty was passed on and upheld by this Court in *Hoyt v. Florida*, 368 U.S. 57 (1961). In that case the constitutionality of a Florida statute almost identical to the provisions of Louisiana Code of Criminal Procedure, Article 402 and Article 7, Section 41 of the Louisiana Constitution of 1921 was at issue. The Court upheld the constitutionality of the Florida statute stating:

> We cannot say that it is constitutionally impermissible for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. [*Hoyt, supra*, at 368 U.S. 62, 82 S. Ct. 162-163.]

And at page 61:

> In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for service: men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law. Fla. Stat., 1959, § 40. 10, F.S.A.
>
> In neither respect can we conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.

This rationale is the rule and not the exception in Louisiana. In 1970 out of a total of 1,340,336 women in Louisiana, 67.2% or 901,134 were not in the labor force. II *Women Workers in Louisiana, 1970*, by Susan Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana. Of those women without young children in 1965 and with pre-school age children in 1970, 62.3 percent of the 33.8 percent who were workers in 1965 were non-workers in 1970. II *Women Workers in Louisiana, 1970*, at page 9. Further, 57% of the women working, 32.8% of total women population, had either no children or no children under 18 years. II *Women Workers in Louisiana, 1970*, at page 12.

There has been no contrary jurisprudence from this Court since the *Hoyt* decision, although this Court has had the opportunity to overrule the case at least once. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), the question of the constitutionality of Louisiana Code of Criminal Procedure, Article 402 was not decided, the majority preferring to base the decision (reversing a conviction) on other grounds. To the contrary, in *Leighton v. Goodman*, 311 F. Supp. 1181 (1970) and *United States v. Coci*, 401 F.2d 664, 671 (2nd Cir. 1968), *cert. denied*, 394 U.S. 917 (1969), the con-

stitutionality of the New York statute permitting women to claim exemption has been sustained, both courts citing *Hoyt v. Florida, supra.*

The Louisiana Supreme Court has followed the decision in *Hoyt, supra,* in numerous cases. See *State v. Enloe,* 276 So.2d 283 (1973); *State v. Curry,* 263 So.2d 36 (1972); *State v. Daniels,* 263 So.2d 859 (1972); *State v. Reese,* 194 So.2d 279, *cert. denied,* 389 U.S. 996 (1967); *State v. Comeaux,* 211 So.2d 820 (1968); *State v. Pratt,* 233 So.2d 891 (1970); *State v. Alexander,* 233 So.2d 891 (1970); *State v. Sinclair,* 245 So.2d 365 (1971); *State v. Millsap,* 248 So.2d 324 (1971), and *State v. Amphy,* 249 So.2d 560 (1971).

We recognize that during the past century women's rights have steadily increased to a point where, in most respects, they enjoy the same legal status as male members of our essentially industrial society. Much of this drive towards women's emancipation has resulted from feminists' organized efforts. The time may very well be ripe for amendment of Louisiana Code of Criminal Procedure, Article 402, R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921 to remove this exemption. But the constitutionality of that statute does not turn on whether the state legislature would be well advised to amend it, or even upon the existence of some discrimination. It turns upon whether the classification based upon sex constitutes such an individous discrimination that it is patently arbitrary and utterly lacking in any ra-

tional justification. If any reasonable basis exists for the alleged statutory discrimination, it must be upheld. *See McGowan v. Maryland,* 366 U.S. 420, 426, (1960); *Flemming v. Nestor,* 363 U.S. 603,611 (1955). The Court does not "sit as a superlegislature . . . ," *Salsburg v. Maryland,* 364 U.S. 545, 281 (1953).

In *Leighton v. Goodman,* 311 F. Supp. 1181 (1970), suit was brought by a prospective male juror to declare unconstitutional a New York statute which grants exemption from jury duty to women. In dismissing the suit on defendant's motion pursuant to Rule 12 (b) (1) and (6), the Court addressed itself to the issue of plaintiff's "standing" and stated:

> At the outset we have serious question as to whether plaintiff's action reveals sufficient danger of injury or harm to him to give him standing to attack the constitutionality of § 599 (7). See Gruenwald v. Gardner, 390 F. 2d 591 (2nd Cir) cert. denied, 393 U.S. 982, 89 S. Ct. 456, 21 L. Ed. 2d 445 (1968). There is no indication that even if women were not entitled to statutory exemption plaintiff would not be required to serve. The most that can be said (although it is not asserted by plaintiff) is that if women were obligated to serve without exemption, fewer male jurors might be needed and plaintiff might then be among those not called, which at best presents an extremely thin basis for giving him the right to attack § 599 (7).

Further, in *Alexander v. Louisiana,* 405 U.S. 625 (1972), this Court specifically addressed itself to the equal protection argument brought by a male chal-

lenging Article 402 of the Louisiana Code of Criminal Procedure and held accordingly:

> Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code Crim. Proc. This claim is novel in this court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. Carter v. Jury Commission of Green County, *supra. But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service.* (Emphasis ours.)

As noted by Judge Dawkins in *United States ex rel Doris v. Henderson*, 330 F. Supp. 797 (W.D. of La. 1971):

> The intentional exclusion by a State of qualified persons from a grand or petit jury because of race or national origin has been held to be violative of equal protection of the law. Patton v. Mississippi, 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1947); Hernandez v. Texas, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954). *The Supreme Court has not applied the equal protection clause to prohibit exclusion or inclusion on a jury for any reason other than race or national origin.* See Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953);

> Fay v. New York, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947); Hoyt v. Florida, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961). It is well settled that the Constitution does not require proportional representation. Fay v. New York, supra; Hoyt v. Florida, supra; Akins v. Texas, 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945). (Emphasis ours.)

This Court in *Reed v. Reed*, 404 U.S. 71 (1971) recognized that dissimilar treatment of different classes of persons is not unconstitutional if the "classification is reasonable, not arbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation." This Court also in *Frontiniero v. Richardson*, 411 U.S. 677 (1973), recognized that dissimilar treatment for men and women could be constitutional even applying "strict judicial scrutiny."

2. The three-judge court abused its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961).

The lower court in its opinion at page 23 of the Jurisdictional Statement held:

> When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that Hoyt is no longer binding.

With this language that court overruled *Hoyt*. A district court even when sitting as a three-judge court cannot reverse the Supreme Court of the United States. *Ward v. Luttrell*, 292 F. Supp. 162 (D.C. La. 1968). Three-judge district court was bound by Supreme

Court of the United States decisions upholding constitutionality of state laws prescribing maximum working hours for women. *Ward, supra.*

Inferior court could not overrule a decision of the Supreme Court of the United States. *Bush v. Orleans Parish School Board*, 188 F. Supp. 916, *aff'd*, 365 U.S. 569.

Conclusion

For the reasons stated above, the judgment of the three-judge court in the United States District Court for the Eastern District of Louisiana should be reversed.

Respectfully submitted,

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Certificate

I HEREBY CERTIFY that copies of the foregoing Brief for Appellants have been served upon all counsel by depositing same in the United States mail, postage prepaid, this _____ day of April 1974.

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B-4630, 3-74

Supreme Court, U. S.
FILED
MAY 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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Frontiero v. Richardson, 411 U.S. 677 (1973) 5, 7, 12, 14, 20

Goldblatt v. Board of Education, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), aff'd, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (1968) 13
Grimes v. United States, 391 F.2d 709 (5th Cir. 1968) 10

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 8
Hodnett v. Slayton, 343 F. Supp. 1142 (W.D. Va. 1972) 11
Hoyt v. Florida, 368 U.S. 57 (1961) .....*passim*

Kahn v. Shevin, 42 U.S.L.W. 4591 (April 24, 1974) 12

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) 10

McGowan v. Maryland, 366 U.S. 420 (1961) 8
McManaman v. United States, 327 F.2d 21 (10th Cir. 1964) 10
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2A N.J. Rev. Stat. §§69-1, 69-2 20
Vt. Stat. Ann. tit. 12, App. VII, Pt. 1, R. 25 §27 20
W. Va. Code Ann. §§52-1-1 et seq. 20
Wis. Stat. Ann. §§255.01, 270.16 20

Other Authorities:

Bureau of the Census, 1970 Census of the Population, General Social and Economic Characteristics, Final Report PC(1)—C20—Louisiana 195 18-19
Cottle, The Prejudice Against Women Lawyers: How Can It Be Overcome?, 21 Case & Com. 371 (1914) 12
Davidson, Ginsburg & Kay, Cases and Materials on Sex-Based Discrimination (1974) 21
Hayghe, Labor Force Activity of Married Women, U.S. Department of Labor, Monthly Labor Review, Table 4 (April 1973) 18
Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana, Women Workers in Louisiana, 1970 (July, 1972) 19, 21
Johnson & Knapp, Sex Discrimination by Law: A Study in Judicial Perspectives, 46 N.Y.U.L. Rev. 675 (1971) 14, 21
Library of Congress Legislative Reference Service, American Law Division, June 10, 1970, report to the Senate, in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725.27 (1970) 4

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Nagal & Weitzman, Women as Litigants, 23 Hastings L.J. 192 (1971) 8, 13, 17
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Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968) 8
Statistical Abstract of the United States 1972 (93d ed.) 21
White, Selecting the Jury, in Appleman, Successful Jury Trials 123 (1952) 17
Women's Bureau, U.S. Department of Labor, Highlights of Women's Employment and Education (1973) 18
Women's Bureau, U.S. Department of Labor, Women in Labor Force (Nov. 1973) 18

IN THE

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—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR APPELLEES

Opinion Below

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 363 F.Supp. 1110 (1973).

Jurisdiction

On September 7, 1973, the United States District Court for the Eastern District of Louisiana, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed on September 18, 1973. The Jurisdictional Statement was filed on November 12, 1973, and Ap-

pellees' Motion to Affirm was filed on November 28, 1973. Probable jurisdiction was noted on February 19, 1974. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1253.

State Constitutional and Statutory Provisions Involved

La. Const. Art. VII, §41*

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service . . . .

La. Code of Criminal Procedure, Art 402

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

---

* Statutory provisions pursuant to La. Const. Art. VII, §41 were revised by Acts 1972, No. 523. Acts, State of Louisiana, Regular Session 1972, Vol. II 1204-5. LSA-R.S. 13:3055 was repealed and a special exemption for women only was added to LSA-R.S. 13:3056 and La. Code of Criminal Procedure, Art. 405 covering, *inter alia*, "any woman who has a child under sixteen years of age under her care." However, the "volunteers only" provision for women was retained in the constitution; it is still operative in both civil and criminal cases, along with a qualified statutory exemption permitting women who volunteer for service to claim exemption when actually called to serve.

Question Presented

Whether, as the court below held, all litigants are denied due process of law and female litigants are additionally denied the equal protection of the laws by a jury service exemption for women different from that available for men and on the basis of a gender criterion that is wholly unrelated to the objectives of jury service.

Statement of the Case

This class action was commenced on March 16, 1973 pursuant to 42 U.S.C. §1983 to declare unconstitutional and enjoin the enforcement of the Louisiana jury selection system whereby women may not serve on juries without filing a written declaration of their desire to do so. No issues of fact were contested; the parties entered into a stipulation on June 25, 1973 that constituted the basis for adjudication. See Appendix pp. 82-84, 111-12, 120, 165.

The stipulation recites that "[f]ifty-three percent (53%) of the population of persons eligible for jury service in St. Tammany Parish and Washington Parish [the two parishes in which named plaintiffs reside] is female," that in St. Tammany Parish "no more than ten percent (10%) of the persons in the general venire or jury wheel are female," and that in Washington Parish, to the knowledge of the Clerk of Court, "no more than two women . . . have [ever] requested that they be made eligible for jury service" and "only on one occasion has a woman been included in a petit jury venire." Further, the stipulation includes a list of fourteen jury drawings made in St. Tammany Parish in re-

cent years. In five of the drawings, no women were drawn; in two, women represented .05% of the names drawn; in four, 1%; in two, 2%; and in one, where the representation of women was highest, 4%.

Also stipulated were the facts that one of the named plaintiffs "has filed a civil damage action . . . in Washington Parish and has requested a jury trial" and that another of the named plaintiffs "is preparing to file a civil damage action in St. Tammany Parish [and] will request a jury trial."

In a unanimous decision rendered August 31, 1973, judgment entered thereon September 7, 1973, the three-judge district court declared unconstitutional and enjoined the enforcement of Louisiana Constitution Art. VII, §41, and legislation enacted pursuant to it, on the ground that exclusion of women from jury service unless they file a written declaration of their desire to serve denies all litigants due process of law and deprives female litigants of their right to equal protection.

The court below recognized that in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), this Court upheld a Florida scheme* almost identical to the Louisiana system challenged as unconstitutional in the case at bar. However, on the basis of the stipulation of facts, demonstrating that under the Louisiana jury selection system service by women is virtu-

* Florida amended the statute at issue in *Hoyt* in 1967. Fla. Stat. Ann. §40.01, as amended, Laws 1967, c. 67-154, §1. By 1970, Louisiana was the only state to retain "volunteers only" legislation on jury service by women. Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

ally non-existent, and following the direction implicit in this Court's decisions in *Reed* v. *Reed*, 404 U.S. 71 (1971), *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), *Peters* v. *Kiff*, 407 U.S. 493 (1972), and *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), the court concluded:

> When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding. 363 F.Supp. at 1117.

On September 10, 1973, the district court stayed execution of the judgment pending this Court's disposition on appeal.

ARGUMENT

Introduction

Louisiana's jury selection system, by requiring exemption for women "different from that available for men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service," 363 F.Supp. at 1117, denies all litigants due process of law and additionally denies female litigants the equal protection of the laws. The court below so concluded on the basis of stipulated facts demonstrating that the "benign dispensation" accorded women results in jury panels that never include more than five percent females, and frequently less. 363 F.Supp. at 1111.

I.

Female Litigants in Civil Cases Pending in Louisiana State Courts Have Standing to Challenge the Constitutionality of the Louisiana Jury Selection System Whereby Women May Not Serve on Juries Without Filing a Written Declaration of Their Desire to Do So.

Three separate classes of plaintiffs joined in this action: (1) females eligible for jury service whose exclusion from responsibility to serve types them as subordinate citizens, members of "the second sex," persons whose assistance in the administration of justice is not needed by the community; (2) males eligible for jury service, subject to a double burden because similarly situated females are not required to serve; (3) female litigants in civil cases in state court, denied any possibility of a jury drawn from a representative cross-section of the community, because women, fifty-three percent of the population of persons eligible for service, are almost totally absent from the jury pool.

Appellees herein representing female litigants with suits pending in state courts plainly have standing to sue. The court below pretermitted this threshold issue with respect to the two other classes. 363 F.Supp. at 1112. Accordingly, the standing issue at this juncture may be treated summarily.

The test for standing in controversies of this kind is twofold: (1) the interest asserted must be arguably within the zone protected by the constitutional guarantee invoked; (2) the litigant must show that the challenged legislation has or will cause her "injury in fact," injury that need

not be economic. *United States* v. *SCRAP*, 412 U.S. 669 (1973); see *Data Processing Service* v. *Camp*, 397 U.S. 150, 152-53 (1969).

It is beyond debate that the interest asserted by appellees to trial by fairly selected juries falls within the zone protected by the due process and equal protection guarantees of the fourteenth amendment. See *Carter* v. *Jury Commission*, 396 U.S. 320, 325, 330 (1970); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

Similarly, appellees representing female civil litigants are "injured in fact." They have a direct, personal stake in the outcome, assuring concrete adverseness in the presentation of this controversy. See *Baker* v. *Carr*, 396 U.S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). The system they attack destroys the possibility of representative juries in their pending actions, thereby denying them a right secured by the due process clause. See *Carter* v. *Jury Commission, supra*, 396 U.S. at 330 ("[d]efendants in criminal proceedings do not have the only cognizable legal interest in non-discriminatory jury selection"—once a state chooses to provide a jury "whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring [fair] selection"). Further, the challenged scheme denies them the evenhanded treatment secured by the equal protection clause: Louisiana's jury selection system assures that members of their sex, a substantial and identifiable class of citizens eligible for jury duty, will not be represented, even in token numbers. See *Frontiero* v. *Richardson, supra; Reed* v. *Reed*, 404 U.S. 71 (1971) ("dissimilar treatment for men and women who are similarly situated" violates equal protection).

Moreover, the likelihood of economic harm to appellees is substantial. Studies have shown that, in civil cases, juries dominated by one sex award larger damages to plaintiffs of that sex. Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 192-97 (1971), at 196 summarizing Jury Verdict Research Corp., Personal Injury Valuation Handbooks 3676-87 (1966); cf. Note, 12 St. John's L.Rev. 172, 174 (1937) (automatic exemption for women tends to eliminate the most competent and intelligent females, while those least fitted to serve will do so—"the morbidly curious, the idle woman who finds time hanging heavily on her hands, the seeker of thrills").

In *United States* v. *SCRAP, supra,* this Court declared that standing is not to be denied simply because many people suffer the same injury, in *SCRAP,* harm to esthetic and environmental well-being. The formulation of Professor Davis was quoted with approval:

> The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968), cited in 412 U.S. at 689 n. 14. Surely the potential harm to appellees in exposure to unfairly selected juries is more than an "identifiable trifle"; it far surpasses the recreational and esthetic injury present in *SCRAP,* the fraction of a vote at stake in *Baker* v. *Carr, supra;* the five dollar fine and costs in *McGowan* v. *Maryland,* 366 U.S. 420 (1961); and the $1.50 poll tax in *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966).

Finally, as the court below held, appellees' challenge inevitably involves criminal as well as civil jury selection, for the very same mandatory state constitutional provision governs both. See 363 F.Supp. at 1113.

II.

The Louisiana Jury Selection System Discriminates Invidiously on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment.

The gender criterion employed by Louisiana to determine inclusion of individuals in jury venires, a criterion operating to effect almost total absence of women from juries, violates the equal protection mandate in at least two basic respects. First, it violates the requirement that no cognizable group be excluded from jury service, a requirement essential to secure equal protection of the laws to members of that group both as litigants and as potential jurors. *Carter* v. *Jury Commission,* 396 U.S. 320 (1969). In addition, the scheme establishes a gender-based classification that stigmatizes all women, even those who do not wish to serve; in effect, Louisiana has decreed that male participation in the administration of justice is essential, female participation, expendable.

A. *Women are a cognizable group excluded from jury service by Louisiana's jury selection system.*

Exclusion of "identifiable segments of the community from jury panels and from juries ultimately drawn from those panels" denies equal protection to the excluded group, both as litigants and as potential jurors. *Apodaca* v. *Oregon,* 406 U.S. 404, 413 (1972); *Carter* v. *Jury Commission,*

supra. The excluded group, to be considered "identifiable" or "cognizable", must represent a "distinct class" in the community, for example, wage earners (*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946)), daily laborers (*Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966)), non-alien Spanish-Americans (*United States* v. *Pentado*, 463 F.2d 355 (5th Cir. 1972)), atheists (*State* v. *Madison*, 240 Md. 265, 213 A.2d 880 (1965)). See also *Grimes* v. *United States*, 391 F.2d 709 (5th Cir. 1968); *McManaman* v. *United States*, 327 F.2d 21 (10th Cir. 1964).

Recognizing that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both," *Ballard* v. *United States*, 329 U.S. 187, 193 (1946), courts have acknowledged that women are a "cognizable group" for purposes of jury service equal protection analysis. See *White* v. *Crook*, 251 F.Supp. 401 (M.D. Ala. 1966) (three-judge court); cf. *Peters* v. *Kiff*, 407 U.S. 493, 503-504 and n. 12 (1972). See also *Ballard* v. *United States*, *supra*; *Thiel* v. *Southern Pacific Co.*, *supra*; *United States* v. *Zirpolo*, 450 F.2d 564 (3d Cir. 1970) (substantial underinclusion of women on jury venires held impermissible on non-constitutional grounds).

The effect of La. Const. Art. VII, §41 has been stipulated. See pp. 3-4, *supra*. Although women constitute fifty-three percent of the Louisiana population eligible for jury service, the appearance of even one woman on a Louisiana state court jury is a rare event.* A significant variation between the proportionate size of a "discernible" group in the community and its proportionate

* Contrast recent experience in the federal court below, in which women and men are placed on venires on the same basis. See Appendix at 163-64.

size on the jury rolls demonstrates unconstitutional exclusion, *Hodnett* v. *Slayton*, 343 F.Supp. 1142 (W.D. Va. 1972), unless the variation is the product of chance. *Alexander* v. *Louisiana*, 405 U.S. 625, 630 (1971). The staggering variation here is obviously not the product of chance. It is the direct result of the "benign dispensation" accorded women by Louisiana law, a dispensation operating to block even token inclusion of females on juries.

In *Hoyt* v. *Florida*, 368 U.S. 57 (1961), this Court ranked women as a "class in the community" and acknowledged that a (former) Florida scheme indistinguishable from the one in the case at bar might have operated as an "exclusionary device". 368 U.S. at 61. But instead of applying the almost per se rule applied in other jury discrimination cases, the Court deferred to what it conceived to be the chivalrous intent of the legislature. *Hoyt* thus placed women in a class by themselves as the only "discernible" group whose absence from juries did not offend equal protection. As to the "rationality" of the supposed "favor" conferred on women by sparing them from jury duty, the court below in the instant case commented:

> If this were proper sauce for geese, there might be gander gravy too: states might with equal logic grant jury exemptions to all male wage earners who do not ask to serve, with the result that litigants, male and female, would be compelled in practice to submit to verdicts by predominantly female juries. Males might then properly question whether they were being afforded Equal Protection of the laws. 363 F.Supp. at 1114.

B. *Louisiana's "benign dispensation" serves to keep women in their place.*

In *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), this Court declined to perpetuate approval of legislative line-drawing based on gross generalization about the roles of men and women in the community. In *Reed*, the apparent premise of the legislature was that, in general, men have more business experience than women. *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). *Frontiero* concerned, as this case does, the assumption th t women are destined for the care of husbands, home and children, men for participation in the world outside the home. *Hoyt* rested on a lump judgment of the same order, that "woman is still regarded as the center of home and family life". 368 U.S. at 62.

Because the decision in *Hoyt* is impossible to reconcile with the new direction signalled in *Reed* and *Frontiero*, the court below determined that it was not obliged to follow "the outgrown dogma". 363 F.Supp. at 1117. State tax classifications apart, see *Kahn* v. *Shevin*, 42 U.S.L.W. 4591 (April 24, 1974), it is now plain that similarly situated adult men and women are constitutionally entitled to even-handed treatment by the law, and that "it is manifestly unfair to indulge in generalities when speaking of women, which no one would think of using when referring to men." Cottle, The Prejudice Against Women Lawyers: How Can It Be Overcome?, 21 Case & Com. 371 (1914).*

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* In contrast to *Kahn* v. *Shevin*, where a majority of this Court regarded a gender line as a permissible response to past disadvantage, it should be inescapably clear to any "fairminded person" that the classification challenged here discriminates against at least some members of the group it purports to protect. See *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F.Supp. 981, 991 (D.N.J. 1973); cf. *De Funis* v. *Odegaard*, 42 U.S.L.W. 4578, 4587 (1974) (dissenting opinion).

The analysis in *Hoyt* betrays "a view of woman's role which cannot withstand scrutiny under modern standards." *Alexander* v. *Louisiana*, 405 U.S. 625, 639-40 (1971) (concurring opinion). The "benefit" for "women only" of not having to serve on juries was surely no favor to Ms. Hoyt, on trial for second degree murder. Her crime was committed after an altercation in which she claimed her husband had insulted and humiliated her to the breaking point. Empirical evidence supports her assumption that members of her own sex would better understand her state of mind when she hit her husband over the head with a baseball bat, a blow which caused his death. See Nagel & Weitzman, *supra*, 23 Hastings L.J. at 192-97.

Nor has *Hoyt* proved a "favor" to other women litigants and potential jurors. See *De Kosenko* v. *Brandt*, 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (1970) (civil plaintiff who wants women on her jury should not complain to the court, challenging automatic exemption of females from service, but should address her lament to her sisters who prefer "television soap operas, bridge and canasta, the beauty parlor and shopping" to jury duty); *Goldblatt* v. *Board of Education*, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (1968) (exclusion of compensation for female teachers who serve on juries, while male teachers receive full salary less jury fees is "reasonable" because men must serve, but women can avoid jury duty for the asking). See also opinions cited in Appellees' Motion to Affirm, *Edwards* v. *Healy*, No. 73-759, at 13-16.

Overlooked in *Hoyt* is the reality that jury service, more than voting, is not only a right, it is a statutory duty and

a "crucial citizen responsibilit[y]". *Broadway* v. *Culpepper*, 439 F.2d 1253 (5th Cir. 1971). Exclusion of women from this responsibility relegates them "to inferior legal status without regard to [their] actual capabilities." *Frontiero* v. *Richardson, supra*, 411 U.S. at 687. The brand placed upon them adversely affects all members of the class, even those who do not wish to participate. *Peters* v. *Kiff, supra*, 407 U.S. at 499. See also *State* v. *Daniels*, 262 La. 475, 491, 263 So.2d 859, 864 (1972) (dissenting opinion).

Appraising *Hoyt*, its predecessors and its progeny, two commentators who identified themselves as "middle-aged, white males . . . of the subspecies 'law professor'," observed:

> How then is it possible to maintain that an exemption for every woman—including even the childless, single woman, and the working wife or mother—is not an arbitrary discrimination when based solely on her sex? Such a scheme . . . is based—and court opinions right up to the present day support our contention—on an additional assumption: that women are delicate creatures to be encouraged to stay at home and be protected from the hard, cruel world—and incidentally, as long as they *are* at home, to do the cooking, cleaning, mending and ironing for those of us who do have the affairs of the world to attend to.

Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 708-721 (1971).

III.

By Destroying the Possibility That the Jury Will Reflect a Representative Cross-Section of the Community, the Louisiana Jury Selection System Infringes a Fundamental Right and Violates the Due Process Clause of the Fourteenth Amendment.

Strict judicial scrutiny is required in this case not only because the classification established by La. Const. Art. VII, §41 is invidious or suspect, but also because it infringes a fundamental right, *Memorial Hospital* v. *Maricopa County*, 94 S. Ct. 1076 (1974), one "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973).

Due process of law, and the "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946). See also *Brown* v. *New Jersey*, 175 U.S. 172, 175 (1899); *Smith* v. *Texas*, 311 U.S. 128, 130 (1941) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community"). Moreover, the right to a petit jury in a criminal trial, impartially drawn from a representative cross-section of the community, is guaranteed not only by the due process clause itself, but explicitly by the sixth amendment, made applicable to the states by the fourteenth amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

In concluding that Louisiana's jury selection system lacks an essential element of due process, the court below relied upon this Court's illumination in *Peters* v. *Kiff*:

> [E]xclusion of a discernible class from jury service . . . destroys the possibility that the jury will reflect a representative cross-section of the community. 407 U.S. at 500.
>
> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. 407 U.S. at 504.

Following the analysis and identification of due process values presented in *Peters* v. *Kiff*, the court below reasoned:

> A jury panel that is almost entirely male, whether because females are excluded or because they serve only if they volunteer and almost one step forward, cannot be "truly representative of the community," and women's absence does "violence to the democratic nature of the jury system." The jury must not merely mirror the American male, just as it must not reflect the views of only one race or one stratum of society. 363 F.Supp. at 1116.

As is true of absence of members of a particular racial or ethnic group, absence of women from jury panels

> is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience, indispensable if the jury is to comprise a cross-section of the community. 363 F.Supp. at 1115.

While Louisiana's "benign dispensation" impacts with special severity on women litigants, see Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171 (1971) and p. 8 *supra*, the scheme injures males as well. Indeed, the effects of the system are "too subtle and too pervasive to admit of confinement to particular issues or particular cases." *Peters* v. *Kiff*, *supra*, 407 U.S. at 503.*

IV.

The Gender Criterion Employed by Louisiana to Determine Inclusion of Individuals in Jury Venires Bears No Fair and Substantial Relationship to Any Legitimate State Objective.

Two justifications might be urged in support of the classification challenged by appellants: administrative convenience and ensuring care and supervision of home and children. Both figured in this Court's determination in *Hoyt* that legislation virtually assuring overwhelmingly male juries was constitutionally permissible. "[H]istoric public policy" placed women at home; the legislature might proceed on the unsupported assumption that women would burden the court with requests for exemption were they placed on jury rolls on the same basis as men. 368 U.S. at 63.

But the *Hoyt* image of women "as the center of home and family life," of dubious accuracy for many women in

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* Cf. White, Selecting the Jury, in Appleman, Successful Jury Trials 123 (1952) ("If you are representing an attractive young woman, have as many men jurors, old or young, as possible").

1961, is today recognized as a gross generalization of the same order as the familiar stereotypes firmly rejected as a basis for legislative line-drawing in *Frontiero* and *Reed*.

Legislative division of adult members of the community into two distinct classes, men functioning outside the home, women centered within it, no longer accords with reality for a substantial and growing portion of the population. By 1973, more than 33 million women, including 52.3% of all women between 18-64 years old, were in the labor force. Women's Bureau, U.S. Department of Labor, Women in the Labor Force (Nov. 1973). Forty-two percent of women workers worked full-time the year round; 58.5% were married and living with their husbands. Women's Bureau, U.S. Department of Labor, Highlights of Women's Employment and Education (1973). In 1972, 26.9% of the mothers with children under three years old were in the labor force; 36.1% of mothers with children 3-5 years old were gainfully employed; 50.2% of women with children 6-17 years old were in the labor force. Hayghe, Labor Force Activity of Married Women, U.S. Department of Labor, Monthly Labor Review, Table 4, at 34 (April 1973).

Statistics for Louisiana mirror those for the nation generally. The 1970 Census of the Population reports the following figures for Louisiana:

PERCENT OF FEMALES IN THE LABOR FORCE

Age	*Percent*
16 and 17 years	11.8
18 and 19 years	35.9
20 and 21 years	47.2
22 to 24 years	51.7
25 to 34 years	44.5
35 to 44 years	48.2
45 to 64 years	44.0

Bureau of the Census, 1970 Census of Population, General Social and Economic Characteristics, Final Report PC(1)—C20—Louisiana 195. Moreover, of Louisiana's total adult female population, more than 59% had no children under the age of 18. And of the 41% with children under 18, nearly 37% were in the labor force. *Id.* Thus, for nearly three-fourths of the female population covered by Louisiana's "benign dispensation", child care is not a factor determining involvement in civic responsibilities or employment outside the home.

Brief for Appellants at 7 announces that 67.2% of Louisiana women were not in the labor force in 1970. Not disclosed by appellants is the fact that this figure includes females from the age of 14 years. The large adolescent population included in the statistic surely should not be counted for the purpose at hand: none of these adolescents meets age requirements for jury service; this population group is insignificantly represented in the labor force due to school attendance, not occupation at home. The source cited by appellants, read in its entirety, presents a very different picture. It discloses that over 43% of Louisiana women with children between the ages of six to seventeen are working, and that over half of all Louisiana women workers 25 to 59 years of age work full-time the year round. Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana, Women Workers in Louisiana, 1970, at 1, 10, 13, 55 (July 1972).

In short, the supposition that it would be inconvenient to call women for jury duty because most of them are confined at home has no substantial basis in fact. Moreover, experience in the federal courts* and in the thirty

* See 28 U.S.C. §1862; *United States* v. *Zirpolo*, 450 F.2d 424 (3d Cir. 1971).

states that administer jury selection statutes which are nondiscriminatory on their face* suggests that the administrative convenience justification is fanciful. In any event, administrative convenience was precisely the rationale for sex-based classification held insufficient in *Reed* and *Frontiero*:

> [A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ." *Reed* v. *Reed, supra,* at 77, 76.

Frontiero, supra, 411 U.S. at 690.

As a means to ensure that young children are not left without caretakers when their parents are called for jury duty, the scheme is appallingly overbroad and stereotypically underinclusive. It fails to cover men with home and child care responsibilities, among them, widowed fathers and husbands with incapacitated wives. For these

* *See* Alaska Stat. §§9.20.010, 9.20.030; 7 Ariz. Rev. Stat. Ann. §§21.201, 21.202; 3B Ark. Stats. Ann. §§39.101 *et seq.;* 13 Cal. Code Civ. Pro. §§198 *et seq.;* 4 Colo. Rev. Stat. Ann. §§78-1 *et seq.;* 10 Del. Code Ann. §§4505 *et seq.;* 7 Hawaii Rev. Laws §§609-1 *et seq.;* 2 Idaho Code Ann. §§2-201 *et seq.;* Ill. Ann. Stat. ch. 78 §§1 *et seq.* (Smith-Hurd); Ind. Ann. Stat. §4-7115; Iowa Code Ann. §§607.1 *et seq.;* 3A Kan. Stat. Ann. §§43-155 *et seq.;* 1 Ky. Rev. Stat. §§29.025, 29.035; 14 Me. Rev. Stat. Ann. §§1201 *et seq.;* 5A Md. Ann. Code art. 51, §§1 *et seq.;* Mich. Comp. Laws Ann. §§600.1306, 600.1307; 2 Miss. Code Ann. §§1762 *et seq.;* 7 Mont. Rev. Codes Ann. §§93-1301 *et seq.;* 1 Nev. Rev. Stat. §§6.010 *et seq.;* 2A N.J. Rev. Stat. §§69-1, 69-2; 4 N.M. Stat. Ann. §§19-1-1 *et seq.;* 1B N.C. Gen. Stat. §§9-3 *et seq.;* 5 N.D. Cent. Code §§27-09.1 *et seq.;* 1 Ore. Rev. Stat. §§10.010 *et seq.;* 17 Pa. Stat. §1279; 7 S.D. Code §§16-13-10 *et seq.;* Vt. Stat. Ann. tit. 12, App. VII, Pt. 1, R.25 §27; 2 Va. Code Ann. §§8-208.2 *et seq.;* W. Va. Code Ann. §§52-1-1 *et seq.;* Wis. Stat. Ann. §§255.01, 270.16.

men, jury service may be far more burdensome than it is for many women. It covers childless women, women whose children are grown,* and women who have made arrangements for their children's care. Far more appropriate means are available to further a genuine concern with respect to child care. For example, recognizing that child rearing is a function either parent can perform, New Jersey and Montana exempt any individual who has custody of and personally cares for a child. N.J.S.A. 2A:69-2(g); Rev. Codes of Mont. Sec. 93-1304(12).

In sum, Louisiana's jury selection scheme, remnant of "the historical male prejudice against female participation in activities outside the family circle," Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 718-21 (1971), is at best misguided chivalry. In failing to recognize adult females as persons with full civic responsibilities as well as rights, Louisiana's system betrays a view of women ultimately harmful to them. See Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 30-35 (1974). By keeping women off the jury rolls unless they volunteer, Louisiana hardly assists its female citizens to view themselves and be viewed by others as full-fledged participants in community affairs. Rather, the state types women as persons whose assistance in the administration of justice is not really needed by the community.**

* 57.9% of all unemployed married women have no children under the age of 18. Statistical Abstract of the United States 1972, 220 (93d ed.).

** On the consequences of sex typing for Louisiana women in the labor force, see Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana, Women Workers in Louisiana, 1970 (July 1972).

Nor does the fact that a woman may volunteer insulate the state from responsibility for the invidious effect of the classification. "[N]either men nor women can be expected to volunteer for jury service." *Alexander* v. *Louisiana*, 405 U.S. 625, 643 (1971) (concurring opinion). Most individuals, male or female, will avoid a time-consuming civic task, given the opportunity.

By maintaining the gender-based selection system, Louisiana ensures perpetuation of unrepresentative juries and conditions for the administration of justice that are less than optimal. Thus the injury the "benign dispensation" inflicts is not limited to women. "[T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1945).

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

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Supreme Court, U. S.
FILED
MAY 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

HON. EDWIN EDWARDS,
Governor of Louisiana, *et al.*,

Appellants,

v.

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS

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No. 73-759

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

HON. EDWIN EDWARDS, GOVERNOR

OF LOUISIANA, ET AL.,

Appellants,

v.

MARSHA B. HEALY, ET AL.,

Appellees.

On Appeal From the United States District Court
For the Eastern District of Louisiana

BRIEF FOR AMICUS CURIAE CENTER FOR CONSTITUTIONAL RIGHTS

STATEMENT OF INTEREST

The Center For Constitutional Rights is a non-profit, tax exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Civil Rights Movement in the South, the Center has since that

time included in its legal efforts other groups which have been the subject of systematic and pervasive discrimination.

Since 1969 the Center has devoted substantial energy to the struggle of women to effectuate their constitutional rights to equal protection of the laws and to exercise fully both the rights and duties of citizenship.

As part of its work in connection with several widely publicized criminal cases the Center has challenged jury systems which utilize statutory exemptions and excuses in such a way as to markedly decrease the number of women on juries. Amicus has thereby developed a particular interest in eliminating the present substantial underrepresentation of women in both state and federal juries. Amicus sees the present situation as harmful not only to women whose full participation in society is being discouraged, but also to litigants who must go to trial before a jury which is not a true cross section of the community. Finally, because the jury is the cornerstone of our entire legal system, policies and

practices which taint it harm the entire society. Thus amicus wishes to assist this Court in its examination of the within case in an effort to end the sex-based practices which pervide our jury system.

STATEMENT OF PURPOSE

In the instant case this Court is considering the constitutionality of a statute regulating jury service which can be considered nothing short of a blatantly sex discriminatory anachronism. The state of Louisiana is the only remaining state which requires that women must take the affirmative step of registering with the Clerk of the Court in order to be on a jury. La. Stat. Ann.; Code of Cr. Prac., Art. 402. Louisiana justifies placing this burden on women by asserting that "...woman is still regarded as the center of home and family." Appellants' Brief, p. 7, quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)

Despite the fact that Louisiana is the lone state which places this unique burden on women, the vast majority of states and federal districts use the Louisiana rationale to accord women dif-

ferential treatment by giving them automatic excuses from jury service either for being a woman or for having custody or care of a child.*/ This differential treatment not only results in juries with a disproportionately low number of women but continues the stereotype that a woman's place is in the home. Because the same rationale is used to justify the various forms of differential treatment, any decision by this Court regarding the constitutionality of Section 402 may have tremendous impact on the statutory schemes of most of the remaining 49 states and over 80 federal districts. This is doubly important since many of those schemes are currently under challenge. See for example, National Organization for Women, et al. v. Goodman, 73 Civ. 4831 (S.D.N.Y., April 17, 1974); United States v. Briggs, et al., 366 F.Supp. 1356 (N.D.Fla., 1973). Lest this Court, in ruling on the instant appeal inadvertantly sanction other more subtle forms of discrimination, amicus will attempt herein to assist this Court by placing the narrow question of Louisiana's sex-based filing requirement in the larger context of the many other statutory schemes which provide specialized treatment for women.*/

*/ In fact Louisiana, itself, has an automatic child care excuse for women with children under 16 as well as an affirmative registration requirement. La. Stat. Ann. §403.

SUMMARY OF ARGUMENT

Amicus will survey and analyze all the various state and federal jury selection provisions which embody differential treatment on the basis of sex. Amicus will show that all of these provisions, whether or not they are facially sex-based or linked to the child care function, result in the underrepresentation of women on juries and are sex-discriminatory in violation of Equal Protection of the Laws. Underlying all of these systems is the presumption that a woman's proper and exclusive role and preoccupation is that of motherhood. This reinforces sex-stereotypes and perpetuates the legacy of secondclass citizenship. Stereotypes based on the child care

*/ Since amicus fully supports the arguments presented by Appellees, we will not deal in depth with the Louisiana statute challenged herein but rather consider it as one part of the larger statutory treatment of women.

function traditionally assigned to women are at the heart of the pervasive discrimination against women in this society and are therefore suspect. Strict scrutiny of the presumptions embedded in the differential treatment of women's obligation to do jury service is therefore necessary and appropriate. But even under the more lenient test of Equal Protection applied to gender discrimination, the presumption of hardship is unjustified in light of the fact that the majority of women generally, as well as those with young children, spend their days in the workforce and not at home.

To assure that women are adequately represented on juries and to guarantee them equal protection and due process individualized determination of hardship according to neutral standards is required. Thus a prospective juror - male or female - should be excused only upon an affirmative showing that he/she is necessarily engaged in daily child care and that no adequate alternative care (consistent with the child's needs) is available. Administrative convenience might indeed be served by such an individualized hardship

determination but, in any case, the teachings of this Court reveal that administrative convenience is not a proper basis upon which to uphold such sex-stereotyped exemptions, particularly ones which result in the unwarranted elimination of a cognizable class on our juries.

I. THE SPECIALIZED TREATMENT OF WOMEN EMBODIED IN BOTH STATE AND FEDERAL JURY SYSTEMS VIOLATES EQUAL PROTECTION OF THE LAW.

A. Specialized Treatment Of Women In State And Federal Jury Schemes.

Although jury service is required throughout the United States in both state and federal courts, all of our judicial systems have some mechanism for relieving certain persons or classes of persons from that duty. Those mechanisms are normally termed either exemptions or excuses. They are either categorical in nature, relating to a person's occupation or status,*/ or flow from an individualized showing of hardship. The authority for the latter is either expressly provided in the particular statutory scheme or flows from the inherent power of the court to excuse those individuals for whom jury service would constitute

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*/ These occupational classes or groups vary from state to state and district to district but generally include such groups as public officials, police, clergy, attorneys, physicians, dentists, teachers -- if actively engaged in the practice of their professions; persons who have served on a grand or petit jury within the past two years, and persons over 70 years old.

an intolerable burden.

In the vast majority of federal districts and nearly half of the states, women are treated categorically rather than on an individual basis. There are basically four ways in which the federal districts and the states single out women with respect to jury service: 1) requiring that women affirmatively register to be called for jury service; 2) enabling women to remove themselves from jury duty solely on the basis of their sex; 3) relieving women from jury service solely on the basis of child custody and/or care; and 4) maintaining facially sex-neutral automatic excuses for child custody or care, which, will be exercised overwhelmingly by women.

1) Affirmative Registration Required For Women.

Louisiana is the only remaining state with this most extreme provision regarding women, requiring them to come forward and specially register in order to be placed on the jury rolls. La. Stat. Ann. §402. There may however be numerous counties throughout the country which maintain that system as a matter of practice. See for

example, Queens County, N.Y., p. 17, infra.

2) Categorical Excuse For Women.

Five states excuse women solely on the basis of their sex, requiring no showing of hardship whatever. See Appendix A, note 1.

3) Child Care Excuse For Women.

Nine states and more than two thirds of the federal districts grant automatic excuses to women merely on the showing of legal custody or care of a child. The requisite age of the child for the child care excuse varies substantially from state to state and federal district to district, ranging from five years to minority. See App. A, notes 2(a) and (b). The age may even vary from district to district within one state. See for example, California:

> N.Dis. - "Tender years"; Cen. Dis. - 10 years; E. Dis. - 12 years; S.Dis. - 14 years.

4) Sex Neutral Child Care Excuses.

Finally, some few states (three) and federal districts (five) grant categorical excuses or exemptions for child custody or care on a sex neutral basis. See App. A, n.3(a) and (b). It must be recognized, however, that though neutral on

their face, these too will be almost exclusively exercised by women because women are overwhelmingly responsible for child care in our society.

In contrast to these states and the majority of federal districts, thirty-one states plus the District of Columbia and six federal districts have neither special treatment for women nor special excuses for child care. See App. A, n.4(a) and (b). Obviously in these states and federal districts, a woman who would be truly burdened by jury service because of child care or other responsibilities can apply for an individualized hardship excuse.

B. Women, As A Class, Are Not Home-Centered.

All these forms of categorical exemption render jury service voluntary for the defined class. They all reflect the assumption that women are preoccupied with and continually essential to the maintenance of the home and the rearing of children, that the obligation to do jury service would constitute an interruption of home and child care responsibilities, and that such an interruption rises to undue hardship and ex-

treme inconvenience. It is important at the outset that the Court be cognizant of the fact that these assumptions do not coincide with the real life circumstances of a substantial majority of the women entitled to claim these exemptions.

Statistical evidence compiled by the United States Department of Labor illustrates that far from finding their "place" in the home, women are participating in the work force in substantial numbers and that their participation is continually increasing. As of September, 1973, 52.3% of all women between 18 and 64 years old were in the labor force, as compared to 51.1% in September, 1972.*/

Moreover, statistics also demonstrate that in 1973, almost one-half, or 44.1% of women with children under 18 years old were working in the labor force.**/ Of all mothers with children be-

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*/ UNITED STATES DEPARTMENT OF LABOR, WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE (Nov. 1973).

**/ UNITED STATES DEPARTMENT OF LABOR, WOMEN'S BUREAU, Table 2, "Mothers In The Labor Force, By Marital Status And Age Of Children" (Mar. 1973).

tween the ages of six and 17, 68.3% of those who were widowed, divorced or separated (and therefore had exclusive legal custody and primary responsibility for their children) worked, as did 50.1% of those with husbands present. Work force participation of mothers whose youngest child was between the ages of three and five years is also substantial: 54.8% of those widowed, etc., and 38.3% of those with husbands present. Even among mothers whose youngest child was less than three years, 38.5% of those widowed, divorced, or separated, and 29.4% of those living with their husbands were in the labor force.*/

Thus, in 1973, over all the categories discussed, the effect of a child-care exemption for women with young children is unrelated to any unusual hardship in the lives of between 29.4% (mothers of children under three years with husbands present) and 68.3% (widowed, divorced or separated mothers of children between six and 17) of the women it presumes hardshipped. For these

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*/ Id.

women, jury service would not constitute a disruption of a pattern of continuous child care but rather absence from their employment.*/

Furthermore, participation of mothers with young children is continually rising. The percentage participation of mothers with children under 18 has increased five-fold since 1940, rising from 8.6% in 1940**/ to 44.1% in 1973.***/ The same compilations reveal that between 1967 and 1973 this percentage rose from 38.2 to 44.1, constituting a 15.4% increase in labor force participation.****/

Finally, these statistics do not account for all the other mothers of young children who

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*/ The national statistics were borne out in a study of the operation of the automatic excuse for women with custody of children under ten provided by the Jury Plan of the Northern District of Florida, United States v. Briggs, supra. Uncontested statistical evidence compiled on the basis of a random sampling of the jury qualification questionnaires revealed that 48.1% of the women who claimed the excuse were employed outside the home.

**/ DEPT. OF LABOR, WOMEN'S BUREAU, HANDBOOK ON WOMEN WORKERS, Table 17, p. 40 (1969).

***/ "Mothers In The Labor Force, Table 2, supra.

****/ It is significant that the most substantial increases occurred in the category of wom-

(fn. cont. next page)

are away from home because of full or part-time volunteer work. Nor do they account for mothers who, though they do not work, have made*/ or would be able to make alternative arrangements in the community for full-time or after-school care of their children during the normally brief periods required for jury service.

The aforegoing facts demonstrate that categorical treatment of child custody or care as a hardship is completely out of joint with the realities of the lives and needs of the majority of mothers of young children.

(fn. continued from preceding page)

men with children under six years; between 1960 and 1967, the proportion of such mothers working rose from 20% to 29%, (HANDBOOK OF WOMEN WORKERS, supra, Chart 14, p.41), and to 34.2% in 1973, "Mothers in the Labor Force", Title 2, supra.

*/ For example, custodians of children who are away at boarding school, camp or temporarily living with relatives are presently entitled to claim exemption.

II. CATEGORICAL SEX-BASED EXEMPTIONS FROM JURY SERVICE RESULT IN SUBSTANTIAL UNDERREPRESENTATION OF THE COGNIZABLE CLASS OF WOMEN.

It is no longer open to dispute that women constitute a "cognizable class" which must be adequately represented on the jury venire. Healy v. Edwards, 363 F.Supp. 1110 (E.D.La. 1973). See also, White v. Crook, 251 F.Supp. 401 (M.D. Ala. 1960). See also Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pacific Co., 328 U.S. 217 (1945); United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1971); United States v. Burkett, 342 F.Supp. 1264 (D.Mass. 1972); United States v. Hoffa, 196 F.Supp. 25 (S.D.Fla. 1961) and 28 U.S.C. 1862 prohibiting the exclusion from jury service on the basis of sex.

Amicus contends that the result of the various excuses and exemption from jury service granted to women described heretofore is the substantial, if not gross, underrepresentation of women in the venire.

Statistics available indicate that the

broader the excuse, the more a woman will be encouraged to avoid the responsibilities of jury service, or, to look at the matter from a slightly different perspective, the more she will be discouraged from full participation in civic life in an area which has long been recognized as a "badge of citizenship." Carter v. Jury Commission, 396 U.S. 320 (19). A recent study of jury service patterns in New York City confirms that the underrepresentation of women serving on juries is most glaring under a volunteer system like the one challenged herein. In Queens County, in the City of New York, which also utilizes an affirmative registration system for women, only 3.4% of the jurors were women, while women constituted 54% of the census.*/ In the rest of New York City, which provides an automatic exemption for women, "females are relatively underrepresented by 77.7%," for women comprise only 12.1%

*/ The Juror In New York City: A Survey Of Attitudes And Experiences, The Departmental Committee For Court Administration, Appellate Divisions, First and Second Departments, New York State Supreme Court (1973) p. 105.

of the jurors, although they are again a majority of the population, 54.4%.*/ The majority of women eliminated under both systems are perfectly able to serve, and are no more inconvenienced by such service than the average man who is not excused.

Amicus cannot provide the Court at this time with statistics with regard to underrepresentation of women under either sex-based child custody/care exemptions or facially sex-neutral child custody/care exemptions, for such statistics are not available. Amicus believes, however, that while the results may not be as dramatic, the difference is merely one of degree. For the same problem underlies all such voluntary systems: -- as long as there are automatic excuses available they will be used, since despite its civic importance, jury service is often looked at as an unpleasant responsibility. It is clear that under such systems the underrepresentation would be substantial, and this Court can take judicial notice of the fact that even today, women

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*/ Id., p. 8.

are primarily responsible for child care, or perceive themselves as such, although most women are no longer so exclusively occupied. Furthermore, it is not yet socially acceptable for men to claim a child care excuse. Thus even sex-neutral child care exemptions will have the impact of excluding a "cognizable class" from jury service, without any showing of necessity by individual members of the class. Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

This Court is not without precedent for invalidating presumptions of categorical hardship which result in the underrepresentation of a cognizable class on juries. In Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), the Court struck down an exclusion of daily wage earners which was based on a presumption of financial hardship. This was done notwithstanding the fact that relief from service was intended as a benefit to day laborers. The insistence by this Court that the fundamental nature of jury service and primacy of the representational principle requires that hardship be treated as an individual,

rather than a categorical matter is as applicable to women with child care responsibilities as to day laborers:

> Jury service is a duty as well as a privilege of citizenship; it is a duty which cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear. Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial 'That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatever on this essential right. Steps innocently taken may one by one, lead to the irretrievable impairment of substantial liberties.' Glasser v. United States, supra, 315 U.S. 86, 62 S.Ct. 472, 86 L.Ed. 680." Thiel v. So. Pacific Co., 328 U.S. at 224-5 (1946).

III. DIFFERENTIAL TREATMENT OF WOMEN IN JURY SELECTION VIOLATES EQUAL PROTECTION OF THE LAWS.

The jury systems heretofore described by amicus are all based on the two-pronged notion that woman is properly or necessarily home full-time tending to the needs of her family, and that her participation on the jury is not sufficiently important to require her to serve on an equal basis with men. The difference between those systems which categorically exempt women and those which exempt women with young children is one of degree not of kind.*/ Analysis of the narrow child custody or care-linked exemption for women underscores the sex-discrimination accomplished by the unconditional exemption for women still retained by five states.

The sex-based child care exemption is unrelated to any biological distinction between the sexes. For every woman with a young child, there

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*/ Nor does the emerging trend towards eliminating the facial sex-link from the child care exemption eliminate the sex-discriminatory character of such categorical relief. Rather the Court must pierce the veil of neutrality where the challenged rule has a disparate impact on a protected class. Griggs v. Duke Power Co., supra.

exists a fortiari a man in precisely the same position. Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). Yet proof of the existence of a child of the specified age automatically excuses a woman without further inquiry because child care is presumed to be the woman's function; the man in the identical position, however, is legally obligated to serve as a juror, cf. Danielson v. Board of Higher Education, Civ. Action No. 2985 (1971), unless presumably, he can meet the strict standard of actual hardship which affords a discretionary excuse. Such a differential burden on men and women was struck down as sex-discriminatory in Frontiero v. Richardson, 411 U.S. 677 (1973) where this Court was unwilling to tolerate a presumption of dependency as to wives while requiring proof of dependency of husbands.

Moreover, the categorical child care granted women is infected by yet another layer of stereotypical assumptions. By failing to take account of individual capacity to serve (or inversely the individual hardship which would result from service), these exemptions embody the

presumption that child care responsibilities are all-consuming and mutually exclusive with civic responsibilities.

The stereotypical notions regarding child care described above are at the core of the historical discrimination against women and are part of what have traditionally been considered to be the "unique" difference between men and women -- pregnancy, and the maternal role long considered inseparable from it. Cf. Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141 (1873). Thus in Muller v. Oregon, 208 U.S. 412 (1908), the court declared:

> Differentiated by [her physical structure, the performance of maternal functions and her dependency on men] from the other sex, she is properly placed in a class by herself...208 U.S. 412, 422.

Placed in a "class by herself" because of characteristics considered unique to women and stereotypical assumptions of her maternal role and obligations, she was cast outside the reach of the principle of equality for most purposes until recently. For as Justice Frankfurter stated in holding that women could be excluded from the occupation of bartender, "[T]he constitution does

not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'" Goesart v. Clearsy, 339 U.S. 464, 466 (1948).

The sweeping generalization that women are different because they are "the center of home and family life", Hoyt v. Florida, 368 U.S. 57 (1961) which justified all the legal disabilities under which they labored for centuries, has been progressively narrowed under scrutiny of the relevance of supposed differences to the purposes of legislation. In 1908, the court was able to conclude: "That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious." 208 U.S. 412, 421. Today, it has become apparent that if women are at a disadvantage in the struggle for subsistence it is in large part because of human nature rather than natural laws. As a result, many of the man-made laws have been struck down as violating the Equal Protection Clause. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S.

71, (1971).*/

At the root of recent judicial decisions and anti-discrimination legislation such as Title VII of the Civil Rights Act, is the principle that different benefits and burdens should not be imposed on an individual solely because that individual is of one sex or another. See e.g., Frontiero v. Richardson, supra; Reed v. Reed, supra. The plurality's rationale in Frontiero provides a framework for understanding why, whatever standard of constitutionality is applied,

*/ Brenden v. Independent School Dist., 477, F.2d 742 (8th Cir., 1973) (exclusion of females from high school sports programs); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1972) (excluding females as legislative pages); Bennett v. Dyer's Chop House, Inc., 350 F.Supp. 153 (N.D.Ohio 1972) (exclusion of females from restaurant service); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 (E.D.Va. 1970) (exclusion of women from state institution of higher education); Seidenberg v. McSorley's Old Ale House, Inc., 317 F.Supp. 593 (S.D.N.Y. 1970) (exclusion of females from service at ale house); Karezewski v. Baltimore & O.R.Co., 274 F.Supp. 169 (D.C.Ill. 1967) (exclusion of widows from coverage for loss of consortium); White v. Crook, 251 F.Supp. 401 (M.D.Ala. 1966)(exclusion of women from juries); Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529, 95 Cal.2d 329 (1971) (exclusion of women from employment as bartenders).

discrimination based on child care obligations should be subjected to the same scrutiny as other sex-based classifications. In reaching the conclusion that sex should be treated as suspect, the Court looked at the historic rationales for discrimination and concluded that sex discrimination was often based on gross stereotypical distinctions between the sexes. The effect of such stereotyping was to relegate women to a second class citizenship without regard to their individual capacities. Frontiero v. Richardson, supra. Compare Reed v. Reed, supra with Reed v. Reed, 93 Idaho 511, 465 P.2d 638 (1970).

Placed in this historical context, it is apparent that classifications based on child care obligations are not separable from sex-based discrimination but are part of a continuum of sex-based discrimination. Women are assumed to be the persons primarily responsible for the care and maintenance of the home and the welfare of children. The stereotypical assumptions that women have one role, family and home, and men have another, business and politics, are at the heart

of all sex-based discrimination. For practical purposes, there is no difference between refusing to permit women to become lawyers because "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother," Bradwell v. Illinois, supra, at p.141, refusing women with pre-school age children employment, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) or allowing women to "volunteer" for jury service on the basis of outmoded stereotypes of maternal obligation.

The "gross, stereotypical distinctions between the sexes," which Justice Brennan notes in Frontiero, supra, at 689, flow from notions about women such as those described above, are at the root of classifications based on child care responsibilities. Not only are women presumed so inconvenienced by child rearing obligations that they cannot serve on juries, but they also cannot work or participate, equally or at all, in the political and economic affairs of the society. Indeed, the very result of such stereotypes is to confine women to the role of housekeeper

and child rearers.

Statutory classifications based on child care obligations frequently bear no relation to an individual woman's ability to perform or contribute to society, her actual employment situation, her ability to arrange for child care outside the home or share child caring functions with her husband. See Danielson v. Board of Higher Education of the City of New York, supra. Such stereotyped characterizations of the "proper domestic roles" of the sexes, Phillips v. Martin Marietta Corp., supra at 545 (Marshall, J. concurring) result in the diminution or termination of women's earning power, denial of benefits available to others similarly situated, thwarting of career goals, and burdening the assumption by women of civic obligations.

Although some may believe that the specialized treatment of women is a benefit,*/ Douglas,

*/ In contrast, in the recent case of Kahn v. Shevin, 42 U.S.L.W. 4591 (April 23, 1974) where this Court upheld differential treatment for men and women, it did so where women were given preferential treatment as reparation for past discrimination, in such a way as not to perpetuate the discrimination.

J., concurring in Alexander v. Louisiana, 405 U.S. 625 (1972) recognized that the Louisiana scheme, far from being a "benign dispensation," operates to exclude women, for "[n]either man nor woman can be expected to volunteer for jury service," supra at 631 . This is equally true of the exemption schemes described above. For as this Court recognized in Thiel v. Southern Pacific Co., supra, to be treated by an unjustifiably lenient standard denies the class of women the right to be treated as equal participants in the administration of justice, "stigmatiz[ing] the whole class, even those who do not wish to participate by declaring them unfit for jury service and thereby putting a brand upon them affixed by law, an assertion of their inferiority." Peters v. Kiff, 407 U.S. 493 , 499 (1972).

The centrality of the child rearing function to society's view of women's proper role and place is at the heart of such sex-based discrimination and makes the child rearing function perhaps the most fertile ground for stereotype and misunderstanding and the last, most stubborn

and intractable bastion of discrimination. The historical pattern which finally necessitated the adoption of the Reed and Frontiero standard of scrutiny in the area of sex discrimination is precisely what compels the application of that standard to child rearing. To exempt child rearing from that standard would be to erect an insuperable barrier to the legal equality of women.

IV. CATEGORICAL EXEMPTION FOR WOMEN BASED ON CHILD CUSTODY OR CARE IS CONSTITUTIONALLY UNJUSTIFIED.

A. The Exemption Is Suspect And Merits Strict Scrutiny.

This Court has traditionally employed a two-tier standard of review in equal protection cases. In cases involving suspect classifications, such as race,*/ national origin,**/ or alienage,***/ or touching upon fundamental interests, such as the right to travel****/ or the right to privacy,*****/ the Court applies a strict standard of review, requiring the state to establish that the distinctions drawn by the law are necessary to further

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*/ See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964).

**/ See, e.g., Oyama v. California, 332 U.S. 633, 644-646 (1948).

***/ See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971).

****/ See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1968); Dunn v. Blumstein, 405 U.S. 330 (1972).

*****/ See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1964).

an overriding state interest.*/

Whether an automatic child care exemption from jury service accomplishes discriminatory treatment of women by virtue of its facial limitation to or its disparate impact upon women, it should be strictly scrutinized by this Court. The propriety and necessity of strict scrutiny flows from the conjunction here of a sex-based classification which meets all of the Court's established criteria for "suspectness" and the denial effected thereby of the fundamental rights to serve upon and be tried by a representative jury.

As demonstrated heretofore, the exemption of women based on child care responsibilities is effectively a sex-based discrimination which embodies and perpetuates stereotypical presumptions about the incapacity of women as mothers and child carers to assume responsibilities outside the home. As a plurality of this Court held in Frontiero v. Richardson, supra, such sex-based,

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*/ See Developments In The Law - Equal Protection, 82 Harv.L.Rev. 1065, 1087-1131 (1969) (and cases cited therein).

stereotypical classifications must be treated as other suspect classifications:

> [S]ince sex, like race and national origen, is an immutable characteristic, determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." [citation omitted] And what differentiates sex from such nonsuspect statutes (sic) as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. 677, 686.

The plurality's holding coincides with a recent and growing recognition that gender discrimination is as pervasive and costly to society and its disadvantaged members as racial discrimination and requires the same affirmative and stringent measures to eradicate it. Application of strict scrutiny to sex and child care presumptions which serve as a disincentive to women's service on juries is particularly appropriate

since a lesser obligation to fulfill the civic responsibility of jury service is a brand of second-class citizenship.

Indeed, the propriety and necessity of strict scrutiny of such exemptions flows also from the fact that jury service is a "badge of citizenship," in the nature of a fundamental right, which must be accorded and imposed equally on all classes of citizens. Peters v. Kiff, 407 U.S. at 499, supra, Thiel v. Southern Pacific Co., supra. Finally, strict scrutiny of child care exemptions is merited because it infringes the fundamental right of litigants, guaranteed by the Fifth and Sixth Amendments, to trial by a jury drawn from and representing a fair cross-section of the community. Peters v. Kiff, supra, Duncan v. Louisiana, 391 U.S. 145 (1968).

But even should a majority of this Court decline to treat as suspect sex-based classifications like the exemptions discussed herein, they must still be subject to "scrutiny." Reed v. Reed, supra at 75 (1971).

In the area of economic and social legisla-

tion, the Court, investing legislation with a presumption of constitutionality, requires only that distinctions drawn by the challenged statute bear a rational relationship to a legitimate state purpose.*/ While the two-tiered system of review undoubtedly has continuing vitality**/ it appears that the hard dichotomy between strict and minimal scrutiny is undergoing a perceptible softening at the "lower tier."***/ This modification is particularly apparent in cases challenging classifications based on gender, where this Court, in Reed v. Reed, stated that classifications based upon sex:

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike. P.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Id.

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*/ Id.

**/ See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973).

***/ Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 25-33 (1972).

While amicus urges that it is appropriate that categorical child care exemptions from jury service be justified by a compelling state interest, examination of the disparity between the rationale for the rule and the reality of women's status and capabilities demonstrates that such exemptions, which permeate federal and state jury selection systems, fail even under the more lenient test approved by this Court in Reed v. Reed, supra.

B. The Categorical Exemption Bears No Fair And Substantial Relationship To The State's Interest In Relieving Prospective Jurors Of Service Where Undue Hardship Would Result.

As appellees have made clear, the justification for categorical exemption could no longer be that child care should be a full-time preoccupation for women but rather that the particular responsibilities entailed therein renders jury service an undue hardship and extreme inconvenience.

Amicus does not take issue with the notion that real hardship or inconvenience to the community or to the individual prospective juror

should be recognized as a valid basis for relief from the duty to serve. We do not dispute the permissibility of allowing automatic excuse or exemption to persons actively engaged in certain occupations whose continuing services are essential to the health and welfare of the community.*/ Nor do we dispute that where uninterrupted care by the prospective juror is indispensable to the welfare of another person in a state of dependency, relief from service is appropriate. Clearly the dependency of a small child may be such a circumstance justifying a hardship excuse.

The problem with the majority of the statutory or judicial schemes that invite exemption where the prospective juror is a woman and/or has custody and/or care of a young or minor child is that hardship is presumed, rather than individually determined.

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*/ Exemption of these groups does not suffer the same constitutional infirmities that infect the exemptions for women. They do not operate to eliminate a cognizable class; they are based on a real or likely unavailability; and they do not bestow a badge of second-class citizenship.

1. Categorical Treatment Of Women As Hardshipped Is Overinclusive And Irrational.

The presumption of hardship accorded women or women with young children in unfounded in fact. It assumes women to be the exclusive childrearers in this society. Examination of the realities of the life circumstances of this class reveals the fallacy of the sex-stereotypical assumptions upon which the presumption is based. The rationale, therefore, completely fails to support the rule.

First, it is clear that statutes such as the one under review or those which simply exempt women, for which child and home care are the asserted rationale, sweep excessively broadly in that they presume that all women no matter their age, parental, marital, or employment status would suffer hardship at serving on juries.

Even jury selection systems that confine the exemption to women with custody or care of children under a specified age suffer from an analogous overinclusion. They embody the presumption that child custody or care is an all

consuming preoccupation of women which precludes equal undertaking of civic responsibility and obligations. In Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4192, in striking down a prohibition on women returning to work until after their newborn child reached the age of three months, this Court rejected the assumption that mothers of infants are too preoccupied with their care to return to work:

> Of course, it may be that the Cleveland rule is based on another theory -- that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light the rule remains a conclusive presumption that can hardly be said to be universally valid. Id., fn. 15.

The presumption here is far from universally valid. The substantial participation of mothers of even the youngest children in the work force reveal this presumption to be founded on stereotypical thinking rather than on the realities of the demands on women entailed by child custody and care. See Point I, B., supra. */

*/ The irrationality of these child care exemptions is underscored by the tremendous diversity of age limits, ranging from 5 years to the age of majority based on no discernable demogra-

(fn. cont. next page)

In fact, a near majority of all women with children under 18 are in the same position as men, who by the sheer fact of employment and parenthood are not presumed hardshipped by the obligation to do jury service. Moreover, treatment of child custody and care as hardship becomes yearly more overinclusive and irrational since, as we have shown, the percentage of working mothers of young children rises each year.

2. Individualized Determination Of Hardship For Child Care Is The Only Reasonable And Permissible Method Of Excuse.

The State's interest in providing relief from service where true hardship and inconvenience would be suffered by the prospective juror - male or female - would be satisfied by individualized determination of hardship based on an affirmative showing that the person claiming excuse is in fact engaged in daily caretaking responsibilities and that adequate and feasible al-

(fn. cont. from preceding page)
phic differences. See App. A., notes 2(a) and (b).

ternative child care arrangements, taking into account the young child's needs, are not otherwise available for the proposed term of service. Such a standard avoids stereotypical assumptions and comports with the hardship standard generally applied without sacrificing the flexibility necessary to encompass a young child's special needs for continuous care as well as any special difficulties entailed in finding alternative care.

The rationale of classification required by the Constitution demands no less than such a neutral and exacting treatment of child care as a hardship. Merely to eliminate the facial sex discrimination that pervades the selection schemes does not eradicate the sex-discriminatory effect of treating child care as a categorical exemption. In recent years, this Court has consistently invalidated rules and regulations which embody stereotypical conclusive as well as rebuttable presumptions that sweep broadly beyond the interest they were designed to serve, be it under the rubric of due process,

Cleveland Board of Education v. LaFleur, supra; Stanley v. Illinois, 405 U.S. 645 (1972); or under the rubric of equal protection, Cleveland Board of Education v. LaFleur, supra at 4192, (Powell, J., concurring); Frontiero v. Richardson, supra; Stanley v. Illinois, supra at 658-659; Reed v. Reed, supra.

Administrative convenience cannot save such overinclusive and sex-discriminatory schemes. As the Chief Justice wrote in Reed v. Reed:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment....Id., at 76.

See also, Frontiero v. Richardson, supra. Moreover, in this context any argument concerning administrative inconvenience is virtually de minimis. On the basis of the statistical evidence of work force participation of mothers of young children, it can be estimated that approximately one-half of the women who now are entitled to claim exemption for child care or

custody would have no basis for claiming excuse. The necessity of making the affirmative showing of unavailability of adequate alternative child care arrangements would discourage another substantial proportion of the presently eligible population from seeking excuse. The disposition of the remaining few who would seek excuse with each call to serve could consume no more than minutes of the clerk of the court's time, less time perhaps than that involved in processing the larger numbers of prospective jurors now required to account for the anticipated drop-out rate permitted by categorical treatment. Indeed, the fact that 38 states and 6 federal districts have no categorical exemption attests to the eminent workability of a neutral and discretionary hardship system.

The teaching of Thiel v. Southern Pacific Co., supra, that excuse for hardship must be given individualized treatment is thus as applicable where, as here, to do otherwise would result in the under representation of a cognizable class by option of its members as it was

there where a practical exclusion resulted. Official largesse which perpetuates the stereotypes of the past can be no justification for the discrimination that results.

For all the aforegoing reasons, it could not be argued that a categorical exemption meets the test of fair and substantial relationship to a legitimate state objective, let alone the more appropriate and stringent compelling state interest test.

CONCLUSION

WHEREFORE, amicus urges that this Court affirm the decision of the Court below, and, in so doing, take cognizance of the unconstitutionality of the categorical exemptions discussed herein to the end that the underrepresentation of women on juries and the badge of second-class citizenship which these exemptions perpetuate be swiftly eradicated.

Respectfully submitted,

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*/ Ms. Schneider is not yet admitted to the bar.

The attorneys acknowledge the excellent contribution of Laura L. Jacobson, Joan Levy, and Anita S. Nielsen, students at the Brooklyn Law School.

Appendix A

#1. Automatic Excuses for Women

Missouri, Ann.Stat. 494.031; New York, Const.Laws of N.Y. Judiciary, §22-101; Alabama, Code of Ala. Title 30 §21 (where good cause must be shown). Gen.Law. R.I. 9-9-11; Tenn. Stat. 22-101.

A sixth state, Georgia also excuses "any woman, teacher or principal." Georgia Stat.Ann. §59- 112(d). It is not clear from the face of the statute, however, whether this grants an excuse to all women or to all women who are teachers or principals.

In addition, there are miscellaneous excuses or exemptions granted only to women such as Florida's exemption for pregnant women, Fla. Stat.Ann. §40.01 and Massachusetts which exempts any woman "...upon her representation... that she would be likely to be embarrassed by hearing the testimony or discussing the same in the jury room." Ann. Laws of Mass. C.234 §1A.

Finally, in Nebraska and Rhode Island women are called for jury service only after there has been a finding of facilities for them. Rev. Stat.Nebr. 25-1601.01; Gen.Laws of R.I. 9-9-11.

#2. Child Care Excuses for Women

a) State

Under 7 - South Carolina, Code of S.C., §38-108;
Under 10- Texas Civ.stat.of Tex.Ann. Title 42; At. 2135(2)
Under 15 (housewife) - Georgia; Ga.Stat. Ann. 59-112(b);
Under 16-Connecticut, Conn.Gen.Stat. 51-218
Massachusetts, Ann.Laws of Mass., Ch. 234 §1
Louisiana, La.Stat.Ann. Art. 403
Under 18-Florida, Fla.Stat.Ann. §40.01

Minor children-Oklahoma-Okla.Stat.Ann. Art. 38 §28
Utah-Utah Code Ann. §78-46-10

In addition, in Nebraska, Nebr.Rev.Stat. 25-1601.02; and Wyoming, Wyo.St.Ann. §1-80, women can be excused if conditions in her home or her household duties would constitute a hardship.

b) Federal

Under five years (1): P.R.
Under seven years (2): W.Va.,N; W.Va.,S; Alaska; Cal.,C; Canal Zone; Colo.; Fla.,S; Fla.,M; Fla.,N; Ga.,N; Ga.,M; Ga.,S; Idaho; Ill.,E; La.,E; La.,W; La.,M; Minn.; Miss.,S; D.C.; Nebr.; Nev.; N.Y.,N; N.Y.,S; N.Y.,W; N.C.,W; N.Dak.; Ohio,N; Ohio,S; Okla.,N; Okla.S; Okla.,W; Ore.; Pa.,M; Pa.,W; S.Dak.; Tenn.,M; Tenn.W; Tex.,N; Tex.,S; Tex.,W; Tex.,E; Utah; Va.,W; V.I.; Wash.,E; Wisc.,W; Wyo.
Under twelve years (7): Cal.,E; Conn.; Haw.; Md.; SCar.; Va.,E; Wisc.,E.
Under 13 years (1): N.Mex.
Under 14 years (3): Cal.,S; Ill.,N; Ind.,S.
Under 15 years (1): Colo.
Under 16 years (6): Ariz.; Kan.; Me.; N.Y., E; Pa.,E; R.I.
Below high school (1): Mont.
Children of tender years (1): Cal.,N.

Six districts use a somewhat stricter standard as for example Wash.,W., which only grants an excuse where the woman does not have adequate domestic assistance to help with the care of her child. See also Ill.,S; Ind.,N; Mich.,W; Mo.,W; and Mo., E.

#3. Sex Neutral Child Care Excuses

a) State:

Under 16 - Virginia, Va.Ann.Rev.Code, 8-208, 6 (26);
Minor Child - New Jersey, N.J.Stat.Ann. 2A-69-2(g);
Child of any age - Montana, Mont.Rev. Code 93-1304(12).

b) Federal:

(This provision also relates to care or custody of another person unable to care for himself or herself due to illness or physical or mental disability)

Ky.,W; Mass.; Mich.,E; N.H.; N.J.

#4. No Categorical Treatment for Women or Child Care

a) State:

Alaska; Ariz.; Ark.; Calif.; Colo.; D.C. (here we refer to the local D.C. courts, not the Federal District Court); Del.; Hawaii; Idaho; Ill,; Ind.; Kan.; Ky.; Maine; Md.; Mich.; Minn.; Miss.; Mont.; N.H.; N.Mex.; Nev.; N.Car.; N.Dak.; Ohio; Ore.; Pa.; S.Dak.; W.Va.; Wash.; Wisc.

b) Federal:

Guam; Ky.,E; Miss.,N; N.Car.,N; N.Car.,E; Vt.

CERTIFICATE OF SERVICE

The undersigned attorney and member of this Court hereby certifies that she did cause copies of the foregoing Brief Amicus Curiae to be served by U.S. Mail, First Class, Postage Prepaid, upon the following counsel for Appellants and Appellees:

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Other Authorities:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF OF THE AMERICAN BAR ASSOCIATION, *AMICUS CURIAE*

INTEREST OF *AMICUS*

The American Bar Association, the largest national professional organization of attorneys, has more than 155,000 members from all of the fifty states.

The Association has taken a strong stand on behalf of equal rights for women, stating in a resolution adopted by the House of Delegates in 1972,

> "RESOLVED, that the American Bar Association supports constitutional equality for women, and urges the extension of legal rights, privileges and responsibilities to all persons, regardless of sex."

Moreover, the Association has traditionally had a keen interest in the administration of justice in the United States. It has taken the position that all litigants are entitled to a jury which represents a cross section of the community and, concomitantly, that all citizens have a right to be eligible for, and a duty to perform, jury service. The Association's concerns are reflected in 1967 resolutions supporting legislation designed to ensure these objectives:

> "RESOLVED, that the American Bar Association approves and endorses legislation to provide for the random selection of jurors and to prohibit discrimination on account of race, color, religion, sex, national origin, or economic status in the selection of grand or petit jurors in the United States courts such as S. 989 90th Cong. entitled 'Jury Selection and Service Act of 1967.'"
>
> "RESOLVED, that the American Bar Association approves in principle a bill proposed by the Judicial Conference of the United States to prohibit discrimination on account of race, color, religion, sex, national origin or economic status in the selection of grand or petit jurors in any state court."

The Association, in light of its deep commitment to the fair and impartial administration of justice and its opposition to discrimination against underrepresented groups in our society, feels that it can make a significant contribution to the full consideration of a question which bears significantly on the rights of women and on the system of jury service.[1]

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[1] The Association has filed with the Clerk of the Court letters from counsel for both parties consenting to the submission of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Louisiana provides by constitution and statutes that women may serve on juries only by filing a written declaration of their desire to do so. This Court is being asked to determine whether a three-judge United States District Court was correct in its finding that these provisions violate the Equal Protection Clause of the Fourteenth Amendment—a finding which expressly recognized that *Hoyt* v. *Florida,* in which this Court upheld a similar Florida statute, has been *sub silentio* overruled by later Supreme Court cases. This case presents an opportunity for the Court to reconsider a line of cases culminating in *Hoyt* v. *Florida,* which were grounded on invalid, outmoded conceptions of the role of women in society.

The judgment of the court below was correct. Any classication based on sex should be considered suspect and subjected to an exacting test to determine whether it contravenes the Equal Protection Clause. To support such a suspect classication, there must be a showing of a compelling state interest and a finding that the use of the classification is necessary to fulfill that interest.

Moreover, the provisions of Louisiana law constitute deprivations of fundamental rights in violation of the Due Process and Equal Protection Clauses of the Constitution by denying to litigants juries representing a cross-section of the community and by restricting women's eligibility for jury service.

ARGUMENT

I.

Louisiana's Classification Based on Sex Is Not Required by a Compelling State Interest and Therefore Denies to Women the Equal Protection of the Laws.

Louisiana provides by statutes[2] and by its constitution[3] that women may serve on juries only if they file a written declaration of their wish to do so. There is no similar limitation placed on jury service by men. As a result, in the jurisdiction in which the case was brought below, women have never exceeded five percent of any jury panel[4] and, concomitantly, men have borne the overwhelming burden of jury service.

These provisions were successfully challenged in class actions for declaratory and injunctive relief brought by classes consisting of women who argued that they are unfairly deprived of the right to serve on juries by these provisions, men who argued that these provisions impose on them an unfair burden of jury service, and litigants who

[2] La. Rev. Stat. §13:3055 (civil juries): "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

• • • • •

The Louisiana Code of Criminal Procedure, art. 402, has identical language.

[3] La. Const. art. VII, §41, which provides in pertinent part: "[N]o woman shall be drawn for jury service unless she shall have previously filed with the clerk . . . a written declaration of her desire to be subject to such service."

[4] Stipulation of facts.

argued that they are deprived of juries representing a cross-section of the community. Louisiana apparently seeks to justify the provisions on the assumption that the care of young children would be otherwise jeopardized and that this constitutes a compelling state interest. Appellants' Brief, pages 6-7.

This Court should invalidate Louisiana's statutory scheme by finding that sex is a constitutionally suspect classification, impermissible under the Equal Protection Clause of the Fourteenth Amendment unless the state meets the burden of showing that the classification is required by a compelling state interest,[5] a burden which Louisiana clearly has not met.[6] Sex, like race, is an acci-

[5] This Court has subjected statutes under the Equal Protection Clause to "strict scrutiny" if the statutory scheme is based on an inherently "suspect classification"—race, *e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); nationality, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); or alienage, *e.g.*, Graham v. Richardson, 403 U.S. 365 (1971)—or if the statute involves a "fundamental interest," such as voting, *e.g.*, Harper v. Virginia Bd., 383 U.S. 663 (1966); interstate travel, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); criminal appellate due process, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); or procreation, *e.g.*, Skinner v. Oklahoma, *ex rel.* Williamson, 316 U.S. 535 (1942).

If a statute merits strict scrutiny, the state bears the burden of proving that the classification is necessary to meet a "compelling state interest"—a burden seldom met. See, *e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Graham v. Richardson, 403 U.S. at 375; McLaughlin v. Florida, 379 U.S. 184 (1964). *But see* Storer v. Brown, 42 U.S.L. Wk. 4440 (1974).

If neither a fundamental interest nor a suspect classification is involved, there is a presumption of constitutionality rebuttable only if the parties objecting to the statute can show that it is not rationally related to a legitimate state interest. Parties seldom can meet this burden. See, *e.g.*, Allied Stores Inc. v. Bowers, 358 U.S. 522 (1955). *But see* Reed v. Reed, 404 U.S. 71 (1971).

[6] Louisiana's legitimate state interest in providing for young children could be fully met by providing exemptions from jury service for all *persons* who are responsible for the care of young children; a classification by sex is obviously unnecessarily (and stereotypically) overbroad.

dent of birth; moreover, it is a highly visible characteristic. Women—solely because of their sex—have historically been and continue to be victims of discrimination in our society.[7]

Statutes based on stereotypic assumptions of the nature and appropriate role of women, like those before the Court in this case, abound.[8] Case law grounded on the same conceptions of women's natural place as mother and homemaker is still cited as controlling precedent to justify restricting women's rights or increasing their obligations as compared with men.[9]

Women, like blacks and aliens, need the protection afforded by the suspect classification test. Women represent approximately fifty percent of the population. Thus, the myriad of laws which irrationally use a sex classification have the impact of depriving one-half of the population of its Constitutionally protected right to equality under law. These persons should not have to wait for a successful full-scale court challenge to each and every such law in order to attain first-class citizenship. Further, the pervasive discrimination against women in economic, educational and political spheres[10] handicaps them in vindication of

[7] See generally, Kanowitz, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969)

[8] See, *e.g.*, Citizens' Advisory Council on the Status of Women, *Memorandum* (March 1970), 116 Cong. Rec. E2588 (daily ed. Mar. 26, 1970), for a list of fifteen areas of statutory sex discrimination.

[9] See Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971), and cases cited therein.

[10] See generally, President's Task Force on Women's Rights and Responsibilities, A MATTER OF SIMPLE JUSTICE (1970).

their rights: as a group they are ill-equipped to sustain protracted court actions challenging discriminatory laws.

Whether a court should designate a classification as suspect is basically a question of fact. The court must decide whether use of the particular classification is generally so irrational that the classification does not warrant the usual presumption of reasonableness. This decision should be made on the basis of the Court's experience with various uses of the classification and on a consideration of whether the classification is likely to be used rationally. When a court decides that the classification is usually unreasonable, it should establish a rebuttable presumption of irrationality by holding that the classification is suspect. Failure to do so constitutes a finding of fact—whether express or implied—that the classification is generally reasonable and establishes a presumption of validity.

Classifications based on sex are almost invariably irrational. There is no relationship between a person's sex and his or her potential contributions to society, needs or abilities. No longer can such classifications be supported by notions of separate social roles for the sexes. Such a classification may have a reasonable basis only on the rare occasions when a sex classification is compelled because of the physiological differences between the sexes, when such classification is necessary to preserve individuals' rights of privacy, or when the state can prove some other compelling interest such as remedying past discrimination.[11]

[11] See generally, Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 888-909 (1971). The Equal Employment Opportunity Commission has recognized that sex may be a bona fide occupational qualification in some limited circumstances under title VII of the Civil Rights Act of 1964—for example, where re-

With respect to such a classification, the usual constitutional presumption of rationality is no longer meaningful or valid. Rather than continuing to require the persons challenging sex classifications repeatedly to prove irrationality, this Court should now shift the burden to the state to establish a compelling interest requiring the use of such classification.

An example of precedent still cited to show that classification on the basis of sex is rational and permissible is *Hoyt* v. *Florida*, 368 U.S. 57 (1961), in which this Court upheld a statutory scheme virtually identical to the Louisiana provisions presently before the Court. *Hoyt* is the culmination of a line of cases decided by this Court which are grounded on outmoded and unsupportable attitudes toward the role of women.

In *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), an early ancestor of *Hoyt*, the appellant had been denied admission to the bar solely because of her sex. Three of the seven-member majority of this Court stated their rationale for upholding the state action in a concurring opinion as follows:

> "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance,

quired for authenticity as in the case of an actor or actress. EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.2. Congress seems to have recognized the need to protect privacy rights in Section 907 of title IX of the Education Amendments of 1972, Pub. L. 92-318, June 23, 1972, 86 Stat. 235.

> as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. . . .
>
> "It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. . . .
>
> "[I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.* at 141-42.

Similar conceptions of women's limited place in a man's world underlie the landmark decision upholding protective labor legislation for women, *Muller* v. *Oregon*, 208 U.S. 412 (1908):

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . .

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . .

"It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. . . .

"The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of

vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her." *Id.* at 421-23.

In *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), a state statute limiting bartending by women to wives and daughters of male tavern owners was upheld, this Court finding sufficient justification in its speculation that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems . . . . " *Id.* at 466.

Hoyt is grounded on the same stereotype of the nature and social role of women and the same assumption that classification on the basis of sex raises no serious equal protection problems:

> "Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." 368 U.S. at 61-62.
>
> "There is [not] present here . . . the unfortunate atmosphere of ethnic or racial prejudices . . . ." *Id.* at 68.

The *Hoyt* presumption that administrative convenience and social role can support a statute which classifies by

sex was rejected by this Court in *Reed* v. *Reed*, 404 U.S. 71 (1971), and in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). By rejecting such justifications, these decisions eliminated the rationale of the *Hoyt* decision. The three-judge Federal District Court below properly treated *Hoyt* as *sub silentio* overruled.

In *Reed* an Idaho statute providing that males must be preferred in selecting the administrator of an estate was held to violate the Equal Protection Clause of the Fourteenth Amendment. The Court found that administrative convenience was insufficient to permit a classification by sex:

> "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy . . . . To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." 404 U.S. at 76.

In *Frontiero* this Court held unconstitutional a federal statute which distinguished on the basis of sex in determining eligibility for certain military dependents' benefits. Four justices adopted the course presently urged by *amicus*, holding that classification by sex is inherently suspect and requires "close judicial scrutiny." Their reasons were well articulated: the "long and unfortunate history of sex discrimination," the existence of statutes based on "gross, stereotypical distinctions between the sexes," the fact that sex "is an immutable characteristic determined solely by the accident of birth," and the fact that "women still face pervasive . . . discrimination" in this country. 411 U.S. at 684-87.

Mr. Justice Stewart in *Frontiero* preferred to describe the statutes as working "an invidious discrimination in violation of the Constitution." 411 U.S. at 691. As stated above, it is difficult to conceive of a statute classifying on the basis of sex which does *not* "work an invidious discrimination" except provisions required by biological differences, individual rights of privacy, or the need for affirmative aid to remedy prior discrimination, in which cases a "compelling state interest" might be found.

Three justices in *Frontiero* grounded their finding that the challenged statutes violate equal protection concepts of the Fifth Amendment Due Process Clause[12] on *Reed*'s rejection of the administrative convenience test, deferring any application of suspect status to sex classification in part because the Equal Rights Amendment is before the states for ratification. This Court should not further postpone its consideration of whether sex is a suspect classification. Whatever the political reaction to the proposed Equal Rights Amendment may be, this Court has an obligation to consider and decide whether sex classifications are so inherently unreasonable that they must be presumed to be so judicially. Distinguished opponents of the Equal Rights Amendment have argued against its ratification on the grounds that this Court must be expected to eliminate laws which discriminate on the basis of sex through the Equal Protection Clause—a goal which cannot be fully realized unless sex is held to be a suspect classification. *E.g.*, Hearings on S. J. Res. 61 & S. J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 74

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[12] There is no Equal Protection Clause in the Fifth Amendment, but equal protection concepts inhere in its Due Process clause. Bolling v. Sharpe, 374 U.S. 497 (1954).

(1970) (testimony of Harvard Law School Professor Paul Freund).

This Court's recent decision in *Kahn* v. *Shevin*, 42 U.S. L.Wk. 4591 (1974), does not preclude holding that sex is a suspect classification. In *Kahn* this Court upheld a statute conferring a tax benefit on widows, recognizing the broad legislative discretion permitted in connection with tax legislation. The Court found that the state purpose supporting the exemption was to remedy the effects of past discrimination against women. Such a state purpose —to offer affirmative aid to an oppressed group—may well present a compelling state interest necessitating the use of the suspect classification.[13]

An analysis of the present case, whether based on a strict scrutiny test or a rational relationship test, requires that *Hoyt* be overruled and that the Louisiana law be held unconstitutional. Louisiana has failed to show, not only a compelling state interest necessitating the classification, but also any rational relationship between the classification and a legitimate state interest. In essence its claim is merely one of administrative convenience.

[13] If Kahn v. Shevin instead were interpreted to permit a state to treat women as a group differently from men because of their traditionally different roles, then it would constitute an erroneous continuation of the line of cases ending with Hoyt v. Florida. Nonetheless, it would still be distinguishable from the present case. In Kahn there appeared a disparity in the earnings of women and men affording a rational basis for the classification and as this disparity was attributable to prior discrimination a compelling state interest. However, in Reed, no disparity in the capacity and integrity required to administer an estate appears, and in Frontiero, no disparity in the actual earnings to justify a denial of a dependency allowance appears. In the case at bar, there is no disparity in the capacity to understand evidence and reach a rational verdict thereon.

In holding the law unconstitutional, this Court should find that the time has come to abandon the presumption that classifications based on sex are rational and constitutionally valid. This Court should renounce the concept that women may be treated differently from men under law on the basis that women may properly be relegated to certain narrow roles in our society. This Court should find, as stated in the American Bar Association's resolution, that the time has come for "constitutional equality for women, and . . . the extension of legal rights, privileges and responsibilities to all persons, regardless of sex." To establish such equality under law, this Court must hold that sex is a suspect classification.

II.

Louisiana's Statutory Scheme Violates the Equal Protection Clause and the Due Process Clause by Depriving Litigants of the Fundamental Right to Juries Representing a Cross-Section of the Community and by Limiting Women's Fundamental Rights of Jury Service.

In addition, the provisions of Louisiana law before the Court must be stricken for a second reason: they impinge upon the free exercise of fundamental constitutional rights. Denials of fundamental rights which fail to meet the "compelling state interest" test are not constitutionally tolerated. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and other cases cited in note 5, *supra*.

It is well-established that the right to a jury truly representative of the community is constitutionally mandated. It is implicitly recognized by the Sixth Amendment's guarantee of an impartial tribunal and is therefore required for

federal juries,[14] *Smith* v. *Texas,* 311 U.S. 128 (1940), and for state juries, *Duncan* v. *Louisiana,* 391 U.S. 145 (1968). Any statute which impinges on a litigant's right to a representative jury must be held to involve fundamental interests. *Cf. Peters* v. *Kiff,* 407 U.S. 493 (1972). Since clearly no all-male jury can represent a cross-section of the community, *Ballard* v. *United States,* 329 U.S. 187 (1946), Louisiana's provisions unjustifiably deprive litigants of a fundamental right.

Moreover, this Court has recognized that the right to serve on juries is also a fundamental right. *Peters* v. *Kiff,* 407 U.S. 493, 499 (1972). Jury service is the only opportunity most citizens have to participate in the judicial system and—second only to voting—is the most important involvement of the citizen in government decision-making. It is a basic political right which can be denied to any group only by a showing of strict necessity to meet an overriding state concern.[15] The provisions here in issue restrict women's opportunity to serve on juries to such an extent that ten percent or less of the women who would ordinarily be expected to serve actually do so.[16]

As indicated in part I of this brief, *supra,* Louisiana has failed to establish any compelling state interest requiring the denial of these fundamental rights. Therefore, the provisions violate the Equal Protection Clause. Further, they involve violations of the Due Process Clause, in that they arbitrarily deprive women and litigants of constitutionally protected rights.

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[14] *Cf.*, 28 U.S.C. §1862.

[15] Louisiana's systematic exclusion of women from jury service also unconstitutionally deprives men of the equal protection of the laws in forcing them to carry virtually the entire burden of jury service.

[16] Stipulation of facts.

CONCLUSION

For the above reasons, the American Bar Association respectfully urges this Court to affirm the decision of the three-judge United States District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARGUERITE RAWALT, attorney for *amicus*, hereby certify that 3 copies of this brief were duly served upon attorneys for both parties by mail service, postage prepaid.

MARGUERITE RAWALT

Supreme Court, U. S.
FILED
SEP 20 1974
MICHAEL RODAK, JR., CLERK

No. 73-759

In the Supreme Court of the United States

OCTOBER TERM, 1973

HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, ET AL.,

Appellants,

v.

MARSHA B. HEALY, ET AL.,

Appellees.

On Appeal From the United States District Court For the Eastern District of Louisiana

Supplemental Brief of Appellants Suggesting That The Cause Is Moot

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Supplemental Brief of Appellants Suggesting That The Cause Is Moot

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The appellants in the above-entitled case file this supplemental brief to advise the Court of certain facts which, in appellants' view, render this cause moot:

The questions presented on his appeal are two-fold:

(1) Did the three-judge court abuse its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)?

(2) Do the Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve deny all

of the male and female citizens of Louisiana due process and equal protection as sanctioned by the 14th Amendment of the United States Constitution?

Both of these questions necessarily relate to the existence of Louisiana laws exempting women from service on juries. Pursuant to Act 2 of 1972 of the Louisiana Legislature, a constitutional convention convened on January 5, 1973, for the purpose of framing a new constitution for the State of Louisiana. The constitution drafted by this convention was submitted to and adopted by the citizens of Louisiana at a special election held on April 20, 1974. The new constitution becomes effective at midnight on December 31, 1974. Article V. Section 33 of the new constitution relates to juror qualifications and reads as follows:

(A) Qualifications—A citizen of the state who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. The legislature may provide additional qualifications.

(B) Exemptions—The Supreme Court shall provide by rule for exemption of jurors.

This article does not exempt any persons who have reached the age of majority from jury service. See attached State of Louisiana Constitutional Convention, Verbatim Transcript, Thirty-Sixth Day's Proceeding, August 24, 1973, Vol. XI pp. 98-110. Exhibit 1.

It is thus apparent that there is no occasion for

this Court to pass upon questions which have relevance only to state constitutional and statutorial provisions that have been abandoned.

For this reason, appellants suggest that the issues sought to be raised will be moot, and that the appeal should be dismissed on that ground. See also the draft rule for exemption of jurors prepared by the Permanent Rules Revision Committee of the Supreme Court of Louisiana, attached as Exhibit 2.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this _____ day of _____, 1974.

Exhibit 1.

STATE OF LOUISIANA
CONSTITUTIONAL CONVENTION
VERBATIM TRANSCRIPT
THIRTY-SIXTH DAY'S PROCEEDING
AUGUST 24, 1973
VOLUME XI pp. 98-110

MR. POYNTER

"Section 36. Jurors; Qualifications; Exemptions

Section 36. The supreme court by rule shall provide for qualification and exemption of jurors."

MR. HENRY

Explain it, Mr. Dennis.

MR. DENNIS

Mr. Chairman, fellow delegates, Section 36 represents a change in our law. We have deleted the requirement that jurors be competent and intelligent. We have deleted the requirement that women cannot serve on juries unless they file a certificate requesting that they be allowed to serve. We have deleted the requirement of the number of jurors who must concur to render a verdict. The new part of this provision is that the Supreme Court shall provide for the qualification and exemption of jurors. The reason we adopted this is that exemptions from jury service have really become much too much of a political matter as handled in the legislature. Interest groups have gone to the

legislature and have gotten exemptions from jury service, so that now many of our most qualified citizens are exempted from jury service by law. We have created exemptions for all kinds of people. Therefore, the committee decided that a body less subject to lobbying pressures should decide upon the exemptions. If we don't do this, we are in danger of all of our better qualified citizens being exempted. We have placed this decision in the hands of the Supreme Court. Since the jury serves the court and is part of it, then judging qualifications is really a judicial matter. We feel this would be the most workable way to handle the problem of granting exemptions to persons for jury service.

MR. POYNTER

Amendment No. 1. On page 13, delete lines 31 and 32 both inclusive in their entirety, and insert in lieu thereof the following:

"Section 36 (A) A citizen of the state, who is (The amendment has been changed. Strike out the word 'residing' and insert in lieu thereof 'domiciled') . . . A citizen of the state, who is domiciled within the parish in which he is to serve as a juror and who has reached the age of majority, is eligible to serve as a juror. The legislature may provide additional qualifications.

(B) The Supreme Court by rule shall provide for exemption of jurors."

MR. HENRY

Explain the amendment, sir.

MR. A. LANDRY

Ladies and gentlemen of the convention, on yesterday I circulated an amendment on which fifty-two of my fellow delegates cosigned with me. It brought to my attention, however, that there might be a possibility that it would be wrong for the Supreme Court to set the qualifications. So I have decided to go along with the Pugh, Gravel amendment, because this is more explicit. Now I think that for the non lawyer delegates, I think I should explain to you the process of jury drawing so that you would understand it and see the problems that we, in the various parishes, have in securing a jury, or a group of men or women for jury service. First, the amendment would do this. It would permit every person upon reaching the age of majority, to be eligible for jury service, which means not only male, but also female would be eligible; under the present constitution only the male can serve on the jury except the female can do it by an affidavit with the clerk. However, by statutes, the Louisiana Legislature has permitted women to serve on civil juries. Now in order to secure jurors, it is necessary for the jury commissioners to get up a list of individuals and it is usually selected, not selected, but it is taken from telephone books, from lists of high schools giving the list of names of persons who have reached the age of eighteen. You have to take it from the city directories. You have to take a list from, in my parish, from the water district, which is all the water meters in the parish, and also all of the registered voters of the parish, which means you have

approximately fifteen to twenty thousand names in the large hopper. You cannot separate the women from the men and then, when you draw a criminal jury, you must draw them at random. In my parish, I use the capsule type of drawing where the jury commissioners do not even know what name they are drawing. Only last week, in order to supplement the jury venire list, we had to draw over fourteen hundred names to put in six hundred and fifty names in the jury venire list, because women kept cropping up. Now this would eliminate that situation. They would be eligible to serve both on criminal and civil juries. The legislature would set the qualifications. At the present time, the qualifications to serve as a juror, under the present criminal code, that you must be a citizen of the United States and have resided within the parish for at least one year; be at least age 21, of course that's been changed to eighteen; three, be able to read, write and speak the English language; four, not be under interdiction or incapable of serving as a juror because of a mental or physical infirmity; and five, not be under indictment for a felony nor have been convicted of a felony for which he has not been pardoned.

Now, that doesn't create a problem to qualification. What really creates the problem for jury service is the exemptions. If you look at the statutes you will find under Article 403 the exemptions from jury service. They include, of course, the governor, the lieutenant governor, the state comptroller, the state treasurer, the secretary of state, superintendent of public

education, their clerks and employees, the members, officers and clerks of the legislature, the judges and active officers of the civil courts of this state. Two, any other public official if jury service would seriously interfere with the performance of the official duties. Three, attorneys at law, their legal secretaries and employees, peace officers, ministers of the gospel, physicians and dentists actively engaged in the practice of their profession, school teachers, school bus drivers, pharmacists, members of paid and volunteer fire departments and persons who are required to travel regularly and routinely in the course and scope of their employment. Four, persons who became of age, sickness or other physical infirmity would suffer serious detriment if required to serve as a juror. Five, persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of three years immediately preceding their selection for jury service.

When we omit all of these people, ladies and gentlemen, what do we have left to serve on the jury? Let me show you an example. There is no leeway under the present set-up to where a district judge, when he calls a venire in for a criminal case, where a man or a woman operates a one-man business. When that person comes into court and asks the court to excuse them for the simple reason that they would have to close their business for maybe a week or two in order to serve on the jury, the judge looks at the statutes and says, "I'm sorry, I cannot excuse you, even though I know it will be a hardship on you and your family."

Right afterwards, another person gets up and walks over to the bar of the court, and he says, "Your honor, I'm a volunteer fireman and I would like to be excused". The judge, under the statutes, has to excuse him. If we continue the way we are going, pressure groups, next time, is going to be the American Legion, the Veterans of Foreign Wars, and somebody else is going to be excused. We want to protect the accused in this state. We want to give them a jury. We want to give them a jury of their peers, ladies and gentlemen. If a school teacher is charged with a crime under the present statutes, there might not be one school teacher that would be willing to serve on the jury and I think under the constitution you have a right to be judged by your peers. This does not permit it and I'm asking you that you vote this proposal in the constitution, thereby permitting people to serve on jury so that our accused can get a fair trial.

MR. HENRY

Does that complete your remarks, sir?
Would you yield to a question from Mr. Kean?
The gentleman yields.

MR. KEAN

Mr. Landry, your Subsection B which provides "the Supreme Court by rule shall provide for exemption of jurors." If the Supreme Court took no action with respect to the rule and someone had a death in the family and wanted to be excused by the district judge from serving on the jury, where would he go?

MR. A. LANDRY

I'm sure that this could be set by rule easily with the Supreme Court, Mr. Kean. It would provide for hardship cases which the statutes do not provide for at the present time.

MR. KEAN

But at the present time, the district judges have the right to excuse, do they not?

MR. A. LANDRY

Under the statutes, yes sir, but they are limited.

MR. KEAN

This would take away the right from the district judges to excuse in the absence of a rule by the Supreme Court.

MR. A. LANDRY

It would not, sir, because I am sure the Supreme Court is familiar with that situation and they would put that in their rule.

MR. HENRY

Any further discussion?
Mr. Deshotels.

MR. DESHOTELS

Mr. Ambroise Landry, I'd like to first of all preface my question by saying I kind of feel like Willis and Gravel with that amendment that Gerald Weiss had. I was a coauthor on your amendment too, as you realize. My question is this. Why are you supporting now, a proposal that has partial qualifications in it? You suggest leaving the qualifications up

to the legislature, yet you have a partial delineation of qualifications in the amendment. Why is that?

MR. A. LANDRY

Because of the fact that under the present statutes and the present constitution, women cannot serve on a jury except if they file an affidavit with the clerk. I personally feel that women should be eligible to serve on a jury.

MR. DESHOTELS

I agree with you on that. But my question is in reference to the phrase, "who is domiciled within the parish in which he is to serve as a juror". Why do you have that particular phrase in there?

MR. A. LANDRY

Because this tracks the old constitution and says you have to be a resident or domiciled in the parish.

MR. DESHOTELS

A resident or residing in the parish.

MR. A. LANDRY

That's correct. And sets the age and sets majority also. If you remember in November of 1972, there was a constitutional amendment on the ballot to provide women to serve on a jury. Of course you know what all amendments happened in November, 1972. People were just against amendments, period. But I think the women of the State of Louisiana certainly would like to have the opportunity, not only to serve on civil jury, but also on criminal jury. That was the reason for our amendment.

MR. DESHOTELS

What's the difference between residing and domiciled, Mr. Landry?

MR. A. LANDRY

Personally, I don't see much difference, Mr. Deshotels.

MR. DESHOTELS

Do you know what domiciled is?

MR. A. LANDRY

You could come into my parish if you want to and declare your domicile. Is that correct, Mr. Deshotels?

I don't see much difference between domicile and residence.

MR. HENRY

Yield to a question from Mr. Flory?

The gentleman yields.

MR. FLORY

Mr. Landry, I'm a little confused too, as a coauthor of your original amendment. Isn't it true that the captain of a ship is supposed to be the last man to abandon the ship rather than the first man?

MR. A. LANDRY

We don't bend any ship.

MR. HENRY

Yield to a question from Mr. Burson?

The gentleman yields.

MR. BURSON

Mr. Landry, isn't it true that under Louisiana

law, specifically the Louisiana Civil Code, that there is a whole section defining what domicile is and that this word would then have a legal meaning under those sections of the civil code?

MR. A. LANDRY

Not being experienced in the law, Mr. Burson, I would think you are probably correct, as you are an attorney.

MR. HENRY

Mr. Singletary for a question.

The gentleman yields.

MR. SINGLETARY

Mr. Landry, do you see any problem in all of these various special interest or pressure groups trying to assert any influence on the Supreme Court instead of the legislature in the future, or do you think . . . .

MR. A. LANDRY

I see a whole lot less problems with a man who is elected, or a group of people who is elected, for ten years than persons who are elected for four years.

MR. HENRY

Are there any questions?

Is there any further discussion on the amendment?

Are you ready for . . .

MR. A. LANDRY

I move the previous question.

MR. HENRY

Are you ready for the question?

Without objection, the previous question is ordered.

Therefore when the machine is opened, as many of you as are in favor of the adoption of the amendment will vote yes, those who are opposed will vote no.

The Clerk will open the machine.

Are you through voting?

The Clerk will close the machine.

94 yeas and 15 nays and the amendment stands adopted.

Mr. Landry moves to reconsider the vote by which the amendments were adopted and lay the motion on the table.

Without objection, so ordered.

Are there further amendments to the section, Mr. Clerk?

These other two are not going to be introduced?

MR. POYNTER

The Stinson amendments. Amendment No. 1. On page 13, immediately below line 32, add the following paragraph:

"Notwithstanding any other provision of this constitution, no woman shall be drawn for jury service unless she shall have previously filed with the

clerk of the district court a written declaration of her desire to be subject to such service."

MR. ROY

Explain the amendment, Mr. Stinson.

MR. STINSON

Mr. Chairman, members of the convention, it is with great seriousness that I introduce this amendment. It's a matter that through the years, at least the last three or four sessions that I was a member of the legislature, the same issue came up. The position I take today is the position that I took at that time. This amendment is not in any way to discriminate, is not in any way to state that the ladies of this state are not qualifed to be jurors, but it does say that they have their choice. It's no different from saying that a school bus driver is exempt or a fireman is exempt, or a dentist, or a doctor, or so forth. There are many exemptions. As you know, the exemption that will be set up under the last amendment that was adopted is an exemption that you do not have to claim. You can waive it. When they call the person's name as a prospective juror, they have to claim the exemption. This is an exemption for the ladies of Louisiana without them being required to leave their homes or jobs or wherever they may be, to go into court to claim the exemption. However, the right is given to any female that wishes to serve, to file the intention or desire with the clerk of court, which is in the present constitution. This merely tracks and places in this constitution that provision that was in the 1921 Constitution. I think it has worked well. For a short while,

there was some question whether or not the females could serve and as a practicing attorney, I know that the great, great majority of those that were called went up and asked and begged to get off because they did not want to be forced to serve as a juror. There are many, many cases and it's getting worse, where jury service is more and more distasteful. It is bad for anyone to have to serve on a jury and pass on the destiny or life of some fellow citizen. I feel that that is a thing that our women should not be forced to do unless they wish and desire to do it. As I said before, I am not in any way discriminating against them, belittling them in any way. It says that if they want to, they have the right and they can do it. Now some groups, I'm sure, of the fairer sex will not agree with this, but if there was any way we could take an impartial poll, I would be willing to bet anything that the greater percentage of our female citizens of Louisiana would be in favor of this and not in favor of being forced to jury service. As you know, our cases, criminal cases, are being more involved and taking longer to try them. Some cases, thank goodness, in Louisiana have not gone on as long as in California and other places. But it can be one, and two, and three weeks that a jury would on a case be sequestered. In other words, forced and required to stay together day and night during the duration of that trial. That is a burden that I don't think should be placed on the women of Louisiana. I would like to urge you, let's continue the provisions of the constitution that have worked, in my opinion, well and fairly since 1921.

MR. STINSON

I want to point out again that this is not denying anyone, anything. It is giving a freedom of choice, a choice to serve if you wish. I urge you to let's place this back in the constitution and leave it as it has been through the years. If there are any questions, I'll be happy to answer them.

MR. ROY

Will you yield to a question from Delegate Derbes?

The gentleman yields.

He waives.

Delegate Smith.

MR. SMITH

Mr. Stinson, aren't you for equal rights for women?

MR. STINSON

Yes sir, all women would have the same equal rights under this. Yes sir.

MR. SMITH

Well, don't you think this discriminates against them?

MR. STINSON

What is that, sir?

MR. SMITH

Don't you think it discriminates against the women, not allowing them to serve on juries if . . .

MR. STINSON

This is not denying them. This is preventing them

from being discriminated against by being forced to when they don't want to.

MR. SMITH

You're not mad at the women, are you?

MR. STINSON

No sir, I love the women. Always have and I hope I always will.

MR. ROY

Delegate Hayes.

MR. HAYES

Mr. Stinson, do you know how this is handled in other states? Do ladies serve on jury duty in any other states that you know about?

MR. STINSON

To my best knowledge, in most of the states, now I could be wrong, I haven't researched it, I think they've had like we have where it's optional if they wish to qualify for that.

MR. HAYES

Do they serve in the federal system here in this state?

MR. STINSON

They do, yes.

MR. HAYES

They do serve on the federal courts?

MR. STINSON

Yes, sir.

MR. HAYES

They don't have the option.

MR. STINSON

No, sir.

MR. ROY

Will you yield to a question from Delegate Burns?

The gentleman yields.

MR. BURNS

Mr. Stinson, you've stressed the inconvenience of ladies serving on juries. If they want equal rights, don't you think they ought to take the bitter along with the sweet?

MR. STINSON

No sir, I think they are too sweet to serve on the juries, in answer to your question.

MR. ROY

That's all. Thank you, Mr. Stinson.

Mr. Shannon. Mr. Shanon, you are recognized.

MR. SHANNON

Mr. Chairman, I believe we were ready to vote on this thirty minutes ago, and I think everyone knows how they are going to vote now. I move the previous question on the entire subject matter.

MR. ROY

Is there objection?

Under the rules, I must tell who is to speak. Mrs. Zervigon. Do you waive, Mrs. Zervigon?

MRS. ZERVIGON

Mr. Chairman, the motion was the previous question on the entire subject matter. Before I know

whether I want to waive or not, I'd like to know whether there are other amendments up there.

MR. ROY

There are no other amendments.

MR. STINSON

Mr. Chairman, in view of the fact that I believe in freedom of, especially the ladies, I'd like to answer the question. I think you can get in your argument by a question, please ma'am.

I yield to the question.

MR. ROY

Mrs. Brien.

MRS. BRIEN

I'd like to ask you, do you believe what was told to Lady Macbeth? Woman, thy name is frailty." So do you think we are too frail to act as jurors?

MR. STINSON

No ma'am, I thought what they told her was to go put her clothes on.

MR. ROY

Are there any other questions?

Mr. Stinson, if there are no other questions, the previous question has been moved.

Therefore, if you are finished, I will go forward with the motion.

MR. STINSON

I'll imitate Mr. Jack. I won't take much time, but I would like to urge, as I said, I'm not being frivolous, I'm not belittling the ladies in any way. I'm giving

them a freedom of choice. The different groups like to have their option as to whether they should serve or not, and under this, any lady that wants to serve can serve. It's been the law. We've debated in the legislature, and fortunately the wisdom of the legislature in the past has been to leave it as it is in the present constitution. So I urge you, let's vote here and give the ladies the freedom of choice because there are a lot of ladies that don't want to serve. Your wife, more than likely doesn't want to serve. If she wants to serve, let her go register and serve. Your daughters and different ones. This is a freedom of choice which I think nowadays most everyone has decided is very important. Don't put the burden on the ladies if they don't want it, but give them the right, they who wish to do so. I'd like to urge you to adopt this amendment. I say it's freedom of the ladies not in any way discriminating against them or doing away with their rights. They are certainly not frail enough . . . I'll tell you the last case I had, jury case, before they knew it I had four ladies on the jury and I accepted them. I won the case and they were good jurors. But still, I don't want to force it on those that do not want to. This is giving them the right and the privilege. In thanking you, I'd like to urge you to please vote favorably for this amendment.

MR. ROY

Mr. Stinson sends up amendments to which objection is urged.

Therefore when the machine is opened, as many of you . . .

This is a record vote.

As many of you who are in favor of the amendment will vote yes, those opposed will vote no. The Clerk will open the machine.

10 yeas and *102* nays and the amendments stand rejected.

Mrs. Zervigon moves to reconsider the vote by which the amendments were rejected and to lay the motion on the table.

Is there objection?

Without objection, so ordered.

Are there any further amendments, Mr. Clark?

MR. POYNTER

Not to this section.

MR. ROY

Mr. Landry, Ambroise Landry, moves to adopt the section.

Is there any further discussion?

Are you ready for the question?

Without objection, the question is ordered

Therefore when the machine is opened, as many of you who are in favor of the section will vote yes, those opposed will vote no.

The Clerk will open the machine.

Vote your machines, gentlemen.

Are you through voting?

The Clerk will close the machine.

110 yeas and *2* nays and the section stands adopted.

Mr. Landry moves to reconsider the vote by which the section was adopted and lay the motion on the table.

Without objection, so ordered.

Exhibit 2.

SUPREME COURT OF LOUISIANA

(DRAFT)
ORDER

Pursuant to the authority vested in this court by Article V, Section 33(B) of the Louisiana Constitution of 1974, the following rule for exemption of jurors is hereby adopted as part of the Revised Rules of this court, designated as PART F, GENERAL RULES OF PROCEDURE, Rule XXV, Exemption of Jurors, and is effective January 1, 1975, superseding LSA-R.S. 13:3042, as amended, R.S. 13:3056, as amended and Articles 402 and 403 of the Louisiana Code of Criminal Procedure, as amended:

Section 1. It is the policy of this court that all litigants in Louisiana courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the parish wherein the district court convenes, that all qualified citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of Louisiana and shall have an obligation to serve as jurors when summoned for that purpose, and that no citizen shall be excluded from service as a grand or petit juror of the district courts of Louisiana on account of race, color, religion, sex, national origin or economic status.

Section 2. This court finds that the exemption of the following groups or occupational classes is in the public interest and, accordingly, members of such classes are exempt from jury service:

(a) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or the State, or any subdivision thereof, who are actively engaged in the performance of official duties;

(b) Members in active service in the Armed Forces of the United States and members of the National Guard of this State while on active service;

(c) Members of paid fire or police departments of the State or any subdivision thereof and federal law enforcement officers;

(d) Members of the following groups when regularly and actively engaged in the practice of their professions: attorneys at law, ministers of the gospel, chiropractors, physicians, dentists, pharmacists and optometrists;

(e) All persons over seventy years of age;

(f) Persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of three years immediately preceding their selection for jury service.

Section 3. Any person may waive his exemption from jury service.

Section 4. Any person summoned for jury service may be excused, upon a showing of undue hardship or extreme inconvenience, for such period as the trial

court deems necessary, at the conclusion of which such person shall be summoned again for jury service.

Given our hands and seal this day of , 1974, A.D., in New Orleans, Louisiana.

Joe W. Sanders, Chief Justice

Frank W. Summers, Associate Justice

Mack E. Barham, Associate Justice

Albert Tate, Jr., Associate Justice

John A. Dixon, Jr., Associate Justice

Pascal F. Calogero, Jr., Associate Justice

Walter F. Marcus, Jr., Associate Justice

B-4844, 10-74

Supreme Court, U. S.
FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-759

HON. EDWIN EDWARDS, *et al.*,

Appellants,

—v.—

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY TO MEMORANDUM OF APPELLANTS SUGGESTING MOOTNESS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-759

Hon. Edwin Edwards, et al.,
Appellants,

v.

Marsha B. Healy, et al.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY TO MEMORANDUM OF APPELLANTS SUGGESTING MOOTNESS

This case affects the rights of named plaintiffs as individuals and the class of female litigants they represent, persons denied due process of law and equal protection of the laws by a jury service exemption for "women only" mandated by Louisiana Constitution, Art. VII, sec. 41 and presently operative in both civil and criminal cases.

At midnight on December 31, 1974 a new Louisiana Constitution is scheduled to take effect. While the "volunteers only" provision for female jury service is not retained in the text of the new constitution, nothing therein precludes continuation of the same exemption. Article V, sec. 33 of the new Constitution grants the legislature authority to "provide additional qualifications"; further it directs the

Louisiana Supreme Court to "provide by rule for exemption of jurors." No provision to become operative at midnight on December 31, 1974 requires change in the existing system. Significantly, Article I, sec. 3 of the new Constitution flatly proscribes any law discriminating against a person "because of race or religious ideas, beliefs or affiliations"; discrimination based on sex, by contrast, is proscribed only when "unreasonable." 1/ The Louisiana Supreme

1/ Article I, Section 3 provides:

> Section 3. Right to Individual Dignity
>
> Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

See also Article I, Section 12 which provides:

> Section 12. Freedom from Discrimination
>
> Section 12. In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.

Court has held time and again that the exemption at issue in the instant case is "neither irrational nor discriminatory." See, e.g., State v. Taylor, 282 So.2d 491, 497 (1973); State v. Enloe, 276 So.2d 283 (1973); State v. Curry, 263 So.2d 36 (1972); State v. Daniels, 263 So.2d 859 (1972); State v. Reese, 194 So.2d 279, cert. denied, 389 U.S. 996 (1967); State v. Comeaux, 211 So.2d 820 (1968); State v. Pratt, 233 So.2d 891 (1970); State v. Alexander, 233 So.2d 891 (1970); State v. Sinclair, 245 So.2d 365 (1971); State v. Millsap, 248 So.2d 324 (1971); and State v. Amphy, 249 So.2d 560 (1971).

Voluntary cessation of allegedly illegal activity does not moot a case when the risk of recurrence remains real. United States v. W.T. Grant, 345 U.S. 629, 632 (1953); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 308-310 (1897); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944); Gray v. Sanders, 372 U.S. 368, 376 (1963); United States v. The Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202-203 (1968). A fortiori, a case does not become moot where, as in the case at bar, the unconstitutional practice persists and there is only a prospect of future change. Failure of the Court finally to resolve the merits of this controversy would more than leave the appellants "free to return to . . . old ways"; appellants could continue old ways without interruption. United States v. W.T. Grant, supra at 632. Exacerbating the situation are the divergent interpretations of the supreme federal constitutional requirement by state and federal courts sitting in the

same territorial unit.

Voluntary cessation of contested activity makes a case moot only when it can be determined with assurance that "there is no reasonable expectation that the wrong will be repeated.'" United States v. W.T. Grant, supra at 633. "The burden [of assuring that the wrongful conduct will not recur] is a heavy one." United States v. W.T. Grant, supra at 633; accord, United States v. The Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). Particularly, "[w]here the practice is deeply rooted and long standing," this Court has not permitted litigation to be derailed absent convincing demonstration that the practice will not be revived. Gray v. Sanders, 372 U.S. 368, 375 (1963); Moore v. Ogilvie, 394 U.S. 814, 816 (1969). See also Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944) (case held not moot where employer consistently urged validity of discontinued system of wage computation); Anderson v. City of Albany, 321 F.2d 649, 657 (5th Cir. 1963) (repeal of city segregation ordinances after commencement of suit seeking to enjoin their enforcement did not moot the case, because "[w]hat has been adopted can be repealed, and what has been repealed can be re-adopted"); Jackson v. Bishop, 404 F.2d 571, 575 n. 5 (8th Cir. 1968).

In sum, the status of the instant case as a live "case or controversy" is abundantly supported by federal precedent. The unconstitutional jury exemption is currently in effect; plaintiffs herein, female litigants, remain exposed to juries on which no members of their sex serve. Moreover, any

jury exemption for women only established by the Louisiana Supreme Court in the future will affect the plaintiff class delineated in this action. Boggess v. Berry Corporation, 233 F.2d 389, 390 (9th Cir. 1956); Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1687 (1970). Additionally, jury selection from a representative cross-section of the community is so basic to our system of justice that an urgent public interest impels resolution of this controversy by the Court. United States v. W.T. Grant, 345 U.S. 629, 632 (1953); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 516 (1911); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). See Comment, Twelve Good Persons and True, 9 Harv. Civ. Rts. - Civ. Lib. L. Rev. 561 (1974).

Conclusion

This is a case of actual controversy. The "volunteers only" women's exemption remains in effect and appellants "consistently urge its validity." This case, involving a question of great public importance, meets justiciability requirements and should be adjudicated on the merits.

Respectfully submitted,

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